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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. 28

EVELYN RICE, PETITIONER,

vs.

SIOUX CITY MEMORIAL PARK CEMETERY, INCORPORATED, A CORPORATION; F. K. LYTLE AND J. M. GUNNELL

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

PETITION FOR CERTIORARI FILED FEBRUARY 15, 1954

CERTIORARI GRANTED APRIL 12, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 28

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SIOUX CITY MEMORIAL PARK CEMETERY, INCORPORATED, A CORPORATION; F. K. LYTLE AND J. M. GUNNELL

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IN DISTRICT COURT OF WOODBURY COUNTY

4-48304

EVELYN RICE, Plaintiff and Appellant,

vs.

SIOUX CITY MEMORIAL PARK CEMETERY, INCORPORATED, a Corporation; F. K. Lytle and J. M. Gunnell, Defendants and Appellees

[fol. 3] STIPULATION OF SETTLED RECORD

Come now all the parties by their respective attorneys of record and agree that the following is the settled and agreed upon record upon which this matter is to be presented to the Supreme Court. The record includes all of the pleadings and all of the rulings by the Court on the various motions filed by the parties, except only the petition for removal of the action to the Federal Court and the Federal Court's ruling on said petition and order of remand to the State Court, a copy of the Federal Court's written opinion thereon being readily available by reference to 102 Federal Supplement 658, this settled record being filed in pursuance of Rule 340, Par. (h) of the Rules of Civil Procedure.

(S.) Neil R. McCluhan and Kindig & Beebe, by Lowell C. Kindig, Attorneys for Plaintiff-Appellant. (S.) Shull & Marshall, by Jesse Marshall and Harper, Gleysteen & Nelson, by H. C. Hayser, Attorneys for Defendants-Appellees.

IN DISTRICT COURT OF WOODBURY COUNTY

COURT CERTIFICATE—Filed January 19, 1953

This is to certify that the following constitutes the complete settled record filed in the office of the Clerk of the District Court of Iowa, in and for Woodbury County, on the [fol. 4] 19th day of January, 1953, it being the record agreed upon by the attorneys of record and constitutes the record

on appeal in pursuance to Rule 349 (h) of the Rules of Civil Procedure.

(S.) Ralph C. Prichard, Judge of the District Court.

Recorded —— —, ——.

[fols. 5-6] In District Court of Woodbury County

Amended Petition Combining the Original Petition as Twice Amended—Filed December 5, 1952

Comes now the plaintiff, Evelyn Rice, and in this, her cause of action against the defendants, states to the Court that:

Count I

Par. 1. She is a resident of Winnebago, Nebraska, and the defendant, Sioux City Memorial Park Cemetery, Incorporated, is a corporation incorporated under the laws [fol. 7] of the State of Iowa, with its principal place of business in Woodbury County, Iowa, and that the defendants, F. K. Lytle and J. M. Gunnell, are officers and managing directors of said corporation and are residents of Sioux City, Woodbury County, Iowa.

Par. 2. On or about the 17th day of August, A. D. 1951, the plaintiff entered into a written contract, hereto attached and marked Exhibit "A", and by this reference made a part hereof, for the purchase of three cemetery lots belonging to the Sioux City Memorial Park Cemetery, Incorporated, a corporation, one of which lots was to be used for the burial of her husband, Sergeant John Rice, and the defendant corporation, through its authorized representatives, was so advised, and in part performance of this contract the plaintiff paid the sum of $100.00 to the defendant corporation.

Par. 3. Said Sergeant John Rice was a Sergeant in the United States Army and had been killed in combat while on active duty with the United States Army in Korea, and his body, at the time the contract was entered into, was being returned to the United States for burial.

Par. 3-a. At the time the contract was entered into, the

defendants knew, or reasonably should have known, that Sergeant Rice was a Winnebago Indian.

Par. 4. On or about the 28th day of August, A. D. 1951, pursuant to arrangements made between the plaintiff and the defendant cemetery, a burial ceremony was held at the cemetery maintained by the corporation on the outskirts of Sioux City, Iowa, for final interment of the body.

[fol. 8] Par. 5. The services were attended by the plaintiff, members of her family, members of her deceased husband's family, representatives of the United States Army, a representation of the American Legion Post of Winnebago, Nebraska, and friends of the plaintiff and the decedent. The burial was likewise supervised by representatives of the Sioux City Memorial Park Cemetery, Incorporated, who were present throughout all of the ceremony.

Par. 6. Preceding the ceremony, the funeral procession was met at the entrance of the cemetery and the said procession was escorted to the grave-site by representatives of the defendant corporation and others, and the proceedings were thereupon carried out without objection or interference by the defendant corporation.

Par. 7. Upon the completion of the burial ceremony and after the sounding of Taps, the plaintiff and other interested persons left the cemetery with the knowledge and belief that the body was to be lowered into the grave and the grave covered.

Par. 8. The plaintiff left the premises of the defendant corporation at about 11:30 A. M. on August 28, 1951 and returned to her home near Winnebago, Nebraska. The defendant corporation then notified the undertaking parlor having charge of the arrangements that it would not permit the body to be placed in the ground and that other or different arrangements would have to be made for the interment of said body. Thereafter, and at approximately 4:00 o'clock P. M. of the same day, the plaintiff was advised and informed [fol. 9] that after the completion of the funeral ceremony the defendant corporation had refused to lower the body of her deceased husband into the ground and had wrongfully and without plaintiff's permission caused said body to be removed from the gravesite and transported to various locations in and near the cemetery premises.

Par. 9. At the time and place of receiving this information, the plaintiff was in a highly nervous and distraught condition because of the emotional factors involved in the burial of her deceased husband and the care and maintenance of their three minor children, ages six, three, and two. At this point she was advised that the refusal to bury her soldier husband was because of the fact that he had Indian blood in his veins and that he was not a Caucasian, and that the body would have to be claimed by her for further disposition.

Par. 10. Upon being advised of this refusal on the part of the defendant corporation to lower the body into the grave, the plaintiff returned to Winnebago and there visited with representatives of the defendant corporation, and at said time and place the defendant corporation tendered the plaintiff an affidavit, a copy of which is hereto attached and marked Exhibit "B", and by this reference made a part hereof, which it had prepared and requested that she sign said affidavit, but the plaintiff refused to sign said affidavit because it stated, among other things, that her deceased husband was a member of the Caucasian race, and she had been advised by the representatives of the defendant corporation that their refusal to permit the burial of her deceased husband was based upon the fact that he, being an Indian, [fol. 10] was not a member of the Caucasian race.

Par. 11. Following the refusal of the defendant corporation to permit Sergeant John Rice's body to be buried in the defendant corporation cemetery, and while the plaintiff attempted to make other arrangements for the interment of her husband's body, the President of the United States intervened and arranged for the burial of the plaintiff's husband's body in the Arlington National Cemetery, at Arlington, Virginia, and arrangements and interment were finally made in said Cemetery.

Par. 12. The acts of the defendant caused her great mental distress, humiliation, emotional fatigue, and nervous exhaustion, which condition was subsequently aggravated by the acts of the defendant in issuing statements and publications causing the plaintiff to be held up to ridicule and humiliation because of her marriage to the defendant, and the fact that part of his ancestors were of Indian blood and descent.

Par. 13. One of said publications which was given general circulation is hereto attached and marked Exhibit "C", and by this reference made a part hereof, makes numerous false and misleading statements all to the damage of the plaintiff.

Par. 14. The general tenor of said publication, Exhibit "C", was to hold the plaintiff and her deceased husband to public ridicule and contempt and to continue and extend the humiliation and mental suffering caused the plaintiff by the acts of the defendants.

[fol. 11] Par. 15. The acts of the defendants in refusing to permit the burial of the body of the plaintiff's deceased husband was in direct violation of the plaintiff's rights under the laws of the State of Iowa and of the United States, and under the Fifth and Fourteenth Amendments to the Constitution of the United States and under Section 1, Article 1 and Section 6, Article 1 of the Constitution of the State of Iowa, and, further, was in direct contravention against public policy, and, should a State Court condone the defendants' conduct, it would violate the Fourteenth Amendment to the Constitution of the United States; and, should a Federal Court condone defendants' conduct, it would be in direct violation of the Fifth Amendment to the Constitution of the United States.

Par. 15-a. The clause in the contract restricting burial privileges only to members of the Caucasian race and the conduct of the defendants herein violate the public policy of the United States and of the United Nations, as is reflected in its Charter and as is specifically reflected in the Preamble to said Charter and Chapter 1, Article 1 (3), Chapter 4, Article 13-b, and Chapter 9, Articles 55 and 56; and further said clause in the contract and the conduct of the defendants was a direct violation of Articles 55 and 56 of Chapter 9 of the United Nations Charter and of the plaintiff's rights thereunder, and under Article 6 of the Constitution of the United States this Court is bound by said United Nations Charter.

Par. 16. The acts of the defendants, and each of them, hereinabove set out and complained of, were willful and [fol. 12] malicious and were the direct and proximate cause of the damage herein complained of and suffered by the plaintiff.

Par. 17. The plaintiff was herself free from any negligence contributing in any manner or degree to the damage herein complained of.

Par. 18. As a result of the willful and malicious conduct of the defendants hereinabove set out, the plaintiff has been damaged because of humiliation, nervous upset, and being held up to public ridicule under the circumstances in the sum of $20,000.00.

Par. 19. In addition thereto, the acts of the defendants being willful and malicious and being done with the knowledge that said illegal conduct on their part would harm the plaintiff and subject her to humility and nervous upset, plaintiff is entitled to recover punitive or exemplary damages in the sum of $40,000.00.

Par. 20. This cause of action is the property of this plaintiff and demand has been made upon the defendants and they have failed and refused to pay said damages, or any part thereof.

Wherefore, plaintiff prays that she be given judgment in the sum of $60,000.00, together with interest thereon at the rate of 5 per cent per annum from the date of judgment, and for the costs of this action.

Count II

Comes now the plaintiff and, for this, her separate and different cause of action against the defendants, and each of them, respectfully states to the Court:

[fol. 13] All of the allegations in Paragraphs 1, 2, 3, 3-a, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 of Count I of this petition are by this reference made a part hereof without repetition.

Par. 15. That part of the written contract heretofore referred to as Exhibit "A" attached to this petition which reads:

> "This agreement is assignable only with the consent of seller, and burial privileges accrue only to members of the Caucasian race * * *"

is an illegal and unenforcible provision and is void because it is against public policy and violates the Fifth and Fourteenth Amendments to the Constitution of the United States

and Section 1, Article 1 and Section 6, Article 1 of the Constitution of the State of Iowa, and further violates the laws of the United States Government, and, should a State Court enforce or condone said provision, it would violate the Fourteenth Amendment to the Constitution of the United States, and, should a Federal Court enforce or condone said provision, it would violate the Fifth Amendment to the Constitution of the United States.

Par. 15-a. The clause in the contract restricting burial privileges only to members of the Caucasian race and the conduct of the defendants herein violate the public policy of the United States and of the United Nations, as is reflected in its Charter and as is specifically reflected in the Preamble to said Charter and Chapter 1, Article 1 (3), Chapter 4, Article 13-b, and Chapter 9, Articles 55 and 56; and further said clause in the contract and the conduct of the defendants was a direct violation of Articles 55 and 56 of Chapter 9 of the United Nations Charter and of the [fol. 14] plaintiff's rights thereunder, and under Article 6 of the Constitution of the United States this Court is bound by said United Nations Charter.

Par. 16. Even though it might be held that said provision in the contract, Exhibit "A", is constitutional, a fair interpretation of said clause in the contract, Exhibit "A", gives this plaintiff the right to bury anyone of her own choosing in the cemetery lots which she was purchasing since the plaintiff is herself a member of the Caucasian race and it was, therefore, her privilege to bury anyone not a member of the Caucasian race in her lots.

Par. 17. This plaintiff, having entered into said written agreement with the defendant corporation, and having made partial performance of her obligations by paying the sum of $100.00 to the defendant corporation—which was all that was required to be paid at that time—was entitled to the full and complete performance of said contract on the part of the defendants.

Par. 18. The defendants' conduct hereinbefore alleged amounted to a breach of said written agreement.

Par. 19. The breach of said agreement on the part of the defendants was willful and malicious and done with full knowledge that it would result in the damage herein complained of.

Par. 20. As a direct result of said breach of contract, and without any fault on the part of the plaintiff, the plaintiff has been damaged because of humiliation, being held up to public ridicule and contempt, and mental pain and suffering [fol. 15] and nervous upset in the sum of $20,000.00.

Par. 21. In addition thereto, the conduct of the defendants in violating the terms of said written agreement having been committed willfully, maliciously, and with the knowledge that said conduct would harm and grieve the plaintiff, the plaintiff is entitled to recover punitive or exemplary damages in the sum of $40,000.00.

Par. 22. This cause of action is the property of this plaintiff, and said damages, or any part thereof, have not been paid by the defendants, even though demand was made upon them.

Wherefore, plaintiff prays that she be given judgment in the sum of $60,000.00, together with interest thereon at the rate of 5 per cent per annum from the 28th day of August, 1951, the date of the breach of said contract, and for the costs of this action.

Count III

Comes now the plaintiff and in this, her separate and inconsistent cause of action against the defendants, and each of them, respectfully states to the Court:

She incorporates in their entirety by this reference Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 15-a of Count I of this petition.

Par. 16. The plaintiff's deceased husband, Sergeant John Rice, had 11/16 Winnebago Indian blood and 5/16 white blood in his veins and was, in truth and in fact, a member of the Caucasian race.

Par. 17. Because he was a member of the Caucasian race, this plaintiff, by the terms of said written agreement Exhibit [fol. 16] "A", was entitled to have her deceased husband buried in the defendants' cemetery.

Par. 18. The defendants by their conduct breached said written agreement, Exhibit "A", and were wrong in concluding that the plaintiff's deceased husband was not a member of the Caucasian race and did, therefore, wrongfully violate the terms of said written agreement.

Par. 18-a. Regardless of whether or not the deceased Sergeant Rice was in fact a member of the Caucasian race, that part of the written contract heretofore referred to as Exhibit "A" and attached to the original petition which reads: "and burial privileges accrue only to members of the Caucasian race," is legally unenforcible for the reason that the phrase "Caucasian race" is so ambiguous and unintelligible and meaningless, and, as a result thereof, the defendants acted without legal right in interpreting said contract to exclude Sergeant Rice from burial in defendants' Cemetery.

Par. 19. The defendants' conduct under the circumstances was willful and malicious, and their breach of said contract was the direct cause of the great humility and mental pain and suffering endured by the plaintiff and resulted further in her being held up to public ridicule and contempt and, as a result thereof, she has been damaged in the sum of $20,000.00.

Par. 20. The breach of said contract by the defendants under the circumstances hereinbefore alleged having been willful, wrongful, and malicious, and done with the knowledge that the plaintiff would suffer the damage herein complained of, the plaintiff is entitled to recover punitive [fols. 17-18] or exemplary damages in the sum of $40,000.00.

Par. 21. This cause of action is the property of the plaintiff, and no part of the damage herein complained of has been paid to her, although demand has been made.

Wherefore, plaintiff prays that she be given judgment in the sum of $60,000.00, together with interest thereon at the rate of 5 per cent per annum from the 28th day of August, 1951, the date of the breach of the contract, and for the costs of this action.

[fol. 19] EXHIBIT "A" TO AMENDED PETITION

M No. 1335

Sioux City Memorial Park Cemetery, Inc.

This Contract, made at Sioux City, Iowa, on this 17 day of August, 1951, between the Sioux City Memorial Park Cemetery, Inc. (owners and developers of Sioux City Memorial Park), its successors and assigns, Party of the First

Part (seller) and Mrs. Evelyn Rice, of Winnebago, Nebr., Party of the Second Part (purchaser), Witnesseth:

That the said Party of the Second Part agrees to purchase from the said Party of the First Part the following: Right of Sepulture in and to So. ½ (spaces 4-5 & 6) Lot 58 in Section Veterans, Sioux City Memorial Park, a burial ground with permanent care as hereinafter provided, a plat of which has been or will be recorded with the Recorder of Deeds in Woodbury County, Iowa, with privilege to exchange said lot before Sepulture for any other unsold lot of the same price and privilege at time of transfer, and to pay therefor the sum of Three hundred & no/100 Dollars (300.00) as follows, to-wit, One hundred & no/100 Dollars ($100.00) cash, the receipt whereof is hereby acknowledged, and Five Dollars ($5.00) on Sept. 20, 1951 and Five Dollars ($5.00) on the 20th day of each month thereafter, until the [fol. 20] said entire purchase money is paid in accordance with the terms of installment note executed by Party of the Second Part.

When the balance due hereunder is paid in full the Party of the First Part shall deliver to the Party of the Second Part a good and sufficient warranty deed conveying said lot for burial purposes only, subject to the rules and regulations of the Sioux City Memorial Park Cemetery.

A permanent care, maintenance and improvement fund has been created by setting aside a minimum of 10 per cent of the gross amount received from all lots sold, with the Woodbury County Savings Bank, Trustee, under a trust agreement whereby the funds must be invested as required by the statutes of the State of Iowa and only the income used for perpetual care.

This agreement is assignable only with the consent of seller, and burial privileges accrue only to members of the Caucasian race, and before any burial can be made the grave space or spaces so used shall be paid in full.

It is further agreed that should any of the foregoing covenants remain unperformed by the said Party of the Second Part for a period of 90 days after the same should have been performed under this contract, then, in that event, the said Party of the First Part may re-enter upon the premises without notice and hold the same as of former

estate, and all the said payments made prior to such re-entry shall be considered as a credit to apply on a future purchase of another lot of the same size if purchased by Party of the Second Part within one year from the date of [fol. 21] such re-entry, at the then prevailing prices and terms of payments.

It is further agreed that time is of the essence of this agreement, and in the event of re-entry by Party of the First Part and failure of Party of the Second Part to purchase another lot within one year of date of such re-entry, then all payments made hereinunder shall become forfeited to Party of the First Part as liquidated damages.

This contract is subject to the rules and regulations and by-laws of the Sioux City Memorial Park Cemetery, Inc. The Party of the Second Part agrees to purchase any grave markers necessary from the Party of the First Part. Only bronze markers may be used in said cemetery, and must be purchased from the Party of the First Part subject to its rules and regulations.

No condition, regulation, or agreement other than those printed hereon or contained in Sioux City Memorial Park Cemetery, Inc., rules and regulations shall be binding upon the seller, and this agreement shall not become effective until executed and approved by an exeutive officer of the Sioux City Memorial Park Cemetery, Inc.

In witness whereof we have hereunto subscribed our names this 17 day of August, 1951.

Sioux City Memorial Park Cemetery, Inc., (S) Mrs. Evelyn Rice, Purchaser. (S) By J. Ben Willey, Sales Representative. Address: Winnebago, Nebr. (S) Approved J. M. Gunnell.

$200.00 Sioux City, Iowa, Aug. 17, 1951

For value received, I promise to pay to order of Sioux City Memorial Park Cemetery, Inc., the sum of Two hundred [fol. 22] & No/100 Dollars, at the office of Sioux City Memorial Park Cemetery, Inc., in Sioux City, Iowa, in installments as follows:

Five Dollars on the 20 day of September, 1951.

Five Dollars on the 20 day of each succeeding month thereafter, until the entire amount of $200.00 has been paid.

(S) Mrs. Evelyn Rice, Purchaser. Address, Winnebago, Nebr.

EXHIBIT "B" TO AMENDED PETITION

STATE OF NEBRASKA,
Thurston County, ss:

Evelyn Rice being first duly sworn on oath deposes and says: That I am the widow of John R. Rice a sergeant first class in the United States Army. That he was killed in action in Korea. That he was a member of the Caucasian race. Further affiant saith not.

Subscribed and sworn to before me this 28th day of August, 1951.

———, Notary Public in and for Thurston County, Nebraska.

EXHIBIT "C" TO AMENDED PETITION

The Truth About the Sgt. Rice Incident

In fairness to our Lot Owners and the citizens of Sioux City and vicinity, who are interested in the Memorial Park, we feel that the many false statements that have been published about this incident should be clarified by a frank [fol. 23] statement of the truth:

1. Contrary to general belief and newspaper publicity, the Sioux City Memorial Park did not solicit the burial of Sgt. Rice.

Mr. D. T. Boyd, the undertaker, of South Sioux City, Nebraska, called and made the appointment to meet Mr. Ben Willey, Sales Manager, at the Park, on August 17, 1951, after, as we were later informed, they had been turned down by two or three other cemeteries. Mr. Boyd, Mrs. Rice and her sister (Mrs. Rice and her sister are both white but married to Indian brothers) met Mr. Willey at the Park,

and Mrs. Rice purchased three spaces on an installment basis and arranged for the burial of Sgt. Rice. Nothing was said about Sgt. Rice being an Indian or that Mrs. Rice lived on the Indian Reservation when the lot was purchased, or prior to the funeral. On the 18th day of August a copy of the contract signed by Mrs. Rice was mailed to her containing the restriction limiting burial to members of the Caucasian Race. The funeral was not held until August 28th. Mrs. Rice had her copy of the contract for ten (10) days, which was ample time for her to inform herself of its contents and restrictions. Mr. Boyd knew, or should have known, about the restriction, as an undertaker of this community whose business is dealing with cemeteries, especially as we have been informed that the burial was turned down by two or three other cemeteries before coming to the Memorial Park. Contrary to publicity, the service by the Catholic priest at Memorial Park was not interrupted and the family had already left the grave site when Mr. Willey [fol. 24] asked the undertaker and was informed that the deceased was an Indian. The body was never lowered into the ground. The first notice that the Park had of the fact that the deceased might be an Indian was that practically all of the mourners at the funeral were Indians.

2. The present Owners and Officers of the Park have no racial prejudice and were not responsible for the restriction to only members of the Caucasian Race.

3. Every contract and deed since the cemetery was started carries this restriction.

4. Dr. R. S. McNeish, of the National Museum at Ottawa, Canada, and other Canadian archaeologists have reported definite proof that American Indians are descended from Wild Mongolian Nomads that came to North America from Asia by way of Alaska. In other words, the American Indian is not of Caucasian descent, to the best of our available information.

If the burial of Sgt. Rice had been permitted, every Lot Owner in the Park could have recourse against the corporation for damages for breach of contract. The officers of the Park are legally bound to enforce and protect its contracts and contract holders—such proceedings could have financially wrecked the Park. Any removal of this restriction

would have to be by agreement of all lot owners, which would be a practical impossibility.

5. The officers of the Park have never at any time retracted from the position first taken, as they could not legally do so.

[fol. 25] 6. The apology so publicized was simply an expression of regret that the officers were legally bound to take the position that they did.

7. Contrary to reports in the press, the officers of the Park did not offer Mrs. Rice any lot in the Memorial Park. The City Council of Sioux City offered any lot in any Sioux City owned cemetery. Mrs. Rice had already contracted for space in Memorial Park which made such an offer on behalf of the Memorial Park unnecessary. As she could not legally use the space already contracted for, you can see that such an offer would be meaningless. We have had many inquiries as to why we did not publicly defend our position during the height of the publicity that was given to this incident. Our failure to do so was in deference to the request of many business men and citizens of Sioux City who wished to end the publicity as quickly as possible, and also to our knowledge of the fact that under this mob hysteria, any statements made by us, as had been demonstrated, would not be fairly reported.

8. The restriction to members of the Caucasian Race is almost as old as the cemetery business and has come down with the development of the cemetery business. This restriction is in probably 90 per cent of the private cemeteries in the United States, including Forest Lawn in California and Graceland Park in Sioux City. Private cemeteries have always had a right to be operated for a particular group such as Jewish, Catholic, Lutheran, Negro, Chinese, etc., not because of any prejudice against any race, but be-

[fol. 26] cause people, like animals, prefer to be with their own kind.

9. It was only in 1947 that racial discrimination was removed from Arlington Cemetery in Washington, D. C. (even privates could not be buried next to officers) and yet we understand that Sgt. Rice is one of the first known Indians to be buried there.

10. We also are considerate of the welfare of the Indian—

a. Why can't he vote?

b. Why can't he buy a bottle of beer?

c. Why are 60,000 Navajo and Hopi Indians living in indescribable squalor, with deaths from tuberculosis, pneumonia, dysentery and starvation tripling their death rate? Half of the children cannot go to school, for there are no schools.

d. What about the thousands of other Indians who died in their country's service without recognition?

e. Why the belated recognition? Any veteran of the United States Armed Services can be buried in Arlington without the President's consent, but it *is restricted to only members of the Armed services.* Many statesmen and outstanding public servants who served their country too, would have preferred burial there, but could not because it was restricted.

We submit the above for your fair and unbiased appraisal.

The Memorial Park, Sioux City, Iowa.

[fol. 27] In District Court of Woodbury County

Demand for Jury Trial

Comes now the plaintiff and demands that all the issues as raised in this case be tried to a jury.

In District Court of Woodbury County

Joint Answer of Defendants to Plaintiff's Amended Petition—Filed December 5, 1952

Come now Defendants and for answer to the Amended Petition of Plaintiff state:

Answer to Count I

1. Admit paragraphs 1 and 2.
2. Deny paragraph 3 for lack of information.

3. Deny paragraph 3-a and specifically state that neither the Plaintiff nor anyone advised Defendants, or any of them, [fol. 28] that Plaintiff's deceased husband was a Winnebago Indian. Further answering said paragraph these Defendants state that had they had any such information they would have refused to sell the said lots to Plaintiff for the reason that all of the lots in Defendant's cemetery which have been sold were sold under a uniform contract, expressly providing that the lots were not to be used for the burial of any persons other than members of the Caucasian Race.

4. Admit paragraphs 4, 5, and 6.

5. Deny paragraph 7 for lack of information.

6. Deny paragraph 8 for lack of information, except admit and allege that following the grave-side ceremonies and immediately prior to interment, Defendant's corporation learned for the first time that the deceased was a Winnebago Indian and thereupon advised the said undertaker that the contract of sale for burial lots prohibited the burial of any body other than that of a Caucasian.

7. Deny paragraph 9 for lack of information.

8. Deny paragraph 10 for lack of information, except admit that Defendant corporation tendered to Plaintiff affidavit referred to in said paragraph as Exhibit "B" and offered to permit the said burial if satisfactory evidence were submitted to the effect that the deceased was a member of the Caucasian Race.

9. Deny paragraphs 11 and 12 for lack of information.

10. Admit that Defendant corporation prepared document referred to in paragraph 13 as Exhibit "C" and state that the said document was prepared for and circulated by De- [fol. 29] fendant only to stockholders and lot owners in Defendant corporation, and specifically deny that the said Exhibit "C" contained any false or misleading statements.

11. Specifically deny paragraph 14.

12. Deny paragraph 15 and specifically deny any of the acts of the Defendants constituted a violation of Plaintiff's rights under any law or Constitution of the State of Iowa or of the United States or contravened public policy. Defendants further deny the conclusion in said paragraph 15 to the effect that the action of a State Court "in condoning" Defendants' acts would constitute a violation of any law or constitution.

13. Deny paragraph 15-a, both as to the facts and the legal conclusion therein contained.

14. Deny paragraph 16.

15. Deny paragraph 17 and specifically allege that if Plaintiff suffered any injury or damage in the premises, the same was solely due to her own failure to observe the terms of the contract, Exhibit "A", and which she freely and voluntarily entered into.

16. Deny paragraphs 18, 19, and 20, except admit that Plaintiff has made demand on Defendants and Defendants have refused said demand.

Answer to Count II

For answer to paragraphs 1 to 14 of Count I incorporated by Plaintiff in Count II, these Defendants incorporate herein their answers to said paragraphs.

1. Deny paragraph 15, both as to the facts and legal conclusions therein contained.

[fol. 30] 2. Deny paragraph 15-a, both as to the facts and legal conclusions therein contained.

3. Deny paragraph 16 and specifically allege that the language in Exhibit "A" therein referred to, refers to the body to be buried and not to the person parchasing or owning the burial lot.

4. Answering paragraph 17, Defendants admit the execution of the contract therein referred to and the payment by Plaintiff, and admit that Plaintiff was entitled to the full and complete performance of the contract on the part of the Defendants, but only upon performance by Plaintiff of the obligations undertaken by her in said contract.

5. Deny paragraph 18.

6. Deny paragraphs 18, 19, 20, 21, and 22, except that these Defendants admit that Plaintiff has made demand as therein alleged.

Answer to Count III

For answer to paragraphs 1 to 15-a of Count I incorporated in Count III, these Defendants incorporate herein their answer to said paragraphs.

1. Admit that Plaintiff's deceased husband was eleven-sixteenths (11/16) Winnebago Indian and five-sixteenths (5/16) white as alleged in paragraph 16; deny, however, the

conclusion in the said paragraph that said deceased was a member of the Caucasian Race and allege that he was in fact an Indian.

2. Deny paragraphs 17 and 18.

3. Deny paragraph 18-a and specifically deny that the term "Caucasian Race" as used in the contract, Exhibit "A", is "ambiguous, unintelligible and meaningless," and state the [fols. 31-33] fact to be that the said term had a definite and well-understood meaning at the time and place in question, and was generally understood by all persons, including the Plaintiff, to mean a person having such a percentage of Caucasian or white blood as to be generally recognized and referred to as a white person.

4. Deny paragraphs 19, 20, and 21, except admit demand.

Wherefore, these Defendants pray that Plaintiff's Petition be dismissed and for costs.

[fol. 34] In District Court of Woodbury County

Court's Ruling on Defendants' Motion to Dismiss Plaintiff's Petition as Amended—Filed April 21, 1952

Now, to wit: on this 21st day of April, 1952, it being a day of the regular March, 1952 Term of this court, this matter having heretofore come on for hearing before the Honorable R. W. Crary, a judge of this court, on the Motion of the defendants herein to dismiss the petition of the plaintiff, together with the defendants' motion to dismiss plaintiff's second amendment, with Kindig & Beebe and Neil McCluhan [fol. 35] appearing as attorneys for the plaintiff, and Shull & Marshall and Harper, Gleysteen & Nelson appearing as attorneys for the defendants, and said motions having been argued orally and written briefs and arguments having been filed with the court, and the said motions having been fully submitted and the court duly advised in the premises, rules thereon as follows:

1. That defendants' Motion to Dismiss be and the same is overruled as to Counts I, Ii and III of the plaintiff's petition filed herein.

2. That the defendants' Motion to Dismiss plaintiff's second amendment wherein plaintiff pleads that the restrictive clause in the contract described in plaintiff's petition is violative of the United Nations Charter, is hereby sustained.

IN DISTRICT COURT OF WOODBURY COUNTY

DEFENDANTS' FIRST APPLICATION TO THE COURT TO ADJUDICATE LAW POINTS PRIOR TO TRIAL—Filed April 23, 1952

Come now the Defendants, Sioux City Memorial Park Cemetery, Inc., and Defendants, F. K. Lytle and J. M. Gunnell, as individuals, and jointly and severally apply to the Court to separately hear and determine the following points of law raised in the pleadings herein and which points of law appear after issues joined.

1. Whether or not the Petition and amendments thereto, state any claim upon which relief can be granted as against the individual Defendants, F. K. Lytle and J. M. Gunnell.
[fol. 36] 2. Whether or not Plaintiff's contract, Exhibit "A", attached to her Petition, as alleged in amended Paragraph 15 of Count I, amended paragraph 15 of Count II, and amended paragraph 15 of Count III, is void and unenforceable as a violation of:

(a) The Fifth Amendment to the United States Constitution,
(b) The Fourteenth Amendment to the United States Constitution, and
(c) Sections 1 and 6 of Article I of the Constitution of the State of Iowa.

3. Whether or not the contract, Exhibit "A", attached to Plaintiff's Petition, should be interpreted, as alleged in paragraph 16 of Count II, to give the Plaintiff the right to bury anyone of her own choosing regardless of race in the cemetery lots in question, on the ground that she, the Plaintiff, is a member of the Caucasian Race; or whether the said contract refers to the race of the person or thing to be buried, rather than to the race of the owner of the lot.

4. Whether or not a person alleged to be of eleven-sixteenths (11/16) Winnebago Indian blood and five-sixteenths

(5/16) white blood, as stated in paragraphs 16, 17, and 18 of Count III, is a person of the Caucasian Race within the meaning of the term as used in the contract, Exhibit "A"

5. Whether or not the action of a State or Federal Court "condoning Defendants' conduct" in permitting Defendant to stand upon the terms of its contract and to defend this action in Court would constitute State or Federal action contrary to the Fifth Amendment and Fourteenth Amend- [fol. 37] ment to the United States Constitution, as alleged by Plaintiff in amended paragraph 15 of Count I.

6. Whether or not the acts of the Defendant, Sioux City Memorial Park Cemetery, Inc., alleged in amended Paragraphs 15 of Count I and 15 of Count II constitute, as a matter of law, a violation of "public policy."

7. Whether or not the term "Caucasian Race" as used in the contract, Exhibit "A" is legally unenforceable for the reason that the same is "ambiguous, unintelligible and meaningless," as alleged in paragraph 18-a of amended Count III of the Petition.

IN DISTRICT COURT OF WOODBURY COUNTY

PLAINTIFF'S APPLICATION FOR ADJUDICATION OF LAW POINTS PRIOR TO TRIAL—Filed May 8, 1952

Comes now the plaintiff, Evelyn Rice, and applies to this Court to separately hear and determine the following points of law raised in the pleadings herein, issues having been joined:

1. Whether or not the plaintiff's contract, Exhibit "A", attached to her petition, as alleged in amended Paragraph 15 of Counts I and II, is void and unenforcible as a violation of:

(a) The Fifth Amendment to the United States Constitution.

(b) The Fourteenth Amendment to the United States Constitution.

(c) Sections 1 and 6 of Article I of the Constitution of the State of Iowa.

(d) Public policy of the State of Iowa and of the United States Government.

[fol. 38] 2. Whether or not the contract, Exhibit "A", attached to plaintiff's petition, should be interpreted, as alleged in paragraph 16 of Count II, to give the plaintiff the right to bury anyone of her own choosing, regardless of race, in the cemetery lots in question, on the ground that she, the plaintiff, is a member of the Caucasian Race; or whether the said contract refers to the race of the person or thing to be buried, rather than to the race of the owner of the lot.

3. Whether, as a matter of law, a person alleged to be of 11/16 Winnebago Indian blood and 5/16 White blood, as stated in paragraphs 16, 17, and 18 of Count III, is a person of the Caucasian Race within the meaning of the term as used in the contract, Exhibit "A".

4. Whether or not the action of a State Court "condoning defendants' conduct" in permitting defendant to stand upon the terms of its contract and to defend this action in Court would constitute State action contrary to the Fourteenth Amendment to the United States Constitution.

5. Whether the provision of the contract, Exhibit "A", restricting burial privileges to members of the Caucasian Race is enforcible.

6. Whether the provision in the contract, Exhibit "A", restricting burial privileges to members of the Caucasian Race can be relied upon as a defense.

7. Whether or not the term "Caucasian Race" as used in the contract, Exhibit "A", is as a matter of law legally unenforcible for the reason that the same is "ambiguous, unintelligible and meaningless," as alleged in paragraph [fol. 39] 18-a of amended Count III of the petition.

8. Whether or not the United Nations Charter announces a controlling policy in this matter which does prohibit this Court from giving any legal credence to or condoning of the restrictive covenant in question, as alleged in Paragraph 15-a of Counts I and II of plaintiff's amended petition.

In District Court of Woodbury County

Court's Ruling on Defendants' Application to Adjudicate Law Points—July 8, 1952

Now, to wit: On this 8th day of July, 1952, the court after having oral and written arguments and being duly advised in the premises, rules as follows on the Application of the defendants herein for an adjudication as to law points under Rule 105 R. C. P.:

1. That the petition as amended does not state a claim upon which relief could be granted against the defendants F. K. Lytle and J. M. Connell as individuals.

2. That the racial restrictive clause in plaintiff's contract, Exhibit "A", attached to plaintiff's petition, as alleged in amended paragraph 15 of Count I, amended paragraph 15 of Count II, and amended paragraph 15 of Count III, is not void but is unenforceable as a violation of:

(a) The Fifth Amendment of the United States Constitution.

(b) The Fourteenth Amendment to the United States Constitution, and

[fol. 40] (c) Sections 1 and 6 of Article I of the Constitution of the State of Iowa.

3. That the restrictive clause in the contract, Exhibit "A", attached to plaintiff's petition, refers to the race of the person or thing to be buried, rather than to the race of the owner of the lot.

4. That a person alleged to be of eleven-sixteenths Winnebago Indian blood and five-sixteenths white blood is not, as a matter of law, a person of the Caucasian race within the meaning of the term as used in the contract, Exhibit "A".

5. That the action of a State or Federal court in permitting a defendant to stand upon the terms of its contract and to defend this action in court would not constitute state or federal action contrary to the Fifth Amendment and the Fourteenth Amendment to the United States Constitution, as alleged by plaintiff in amended paragraph 15 of Count I.

6. That the acts of the defendants alleged in amended

paragraphs 15 of Count I and 15 of Count II do not constitute a violation of "public policy" as a matter of law.

7. That the term "Caucasian Race" as used in the contract, Exhibit "A", is not "ambiguous, unintelligible and meaningless," as alleged in paragraph 18-a of amended Count III of plaintiff's petition.

[fol. 41] IN DISTRSCT COURT OF WOODBURY COUNTY

COURT'S RULING ON PLAINTIFF'S APPLICATION TO ADJUDICATE LAW POINTS—Field July 8, 1952

Now, to wit: On this 8th day of July, 1952, the court after having oral and written arguments and being duly advised in the premises, rules as follows on the Application of the plaintiff herein for an adjudication as to law points under Rule 105 R. C. P.:

1. That the racial restrictive clause in plaintiff's contract, Exhibit "A", attached to plaintiff's petition, as alleged in amended paragraph 15 of Count I, amended paragraph 15 of Count II, and amended paragraph 15 of Count III, is not void but is unenforceable as a violation of:

(a) The Fifth Amendment to the United States Constitution.

(b) The Fourteenth Amendment to the United States Constitution.

(c) Sections 1 and 6 of Article I of the Constitution of the State of Iowa.

(d) Public policy of the State of Iowa and of the United States Government.

2. That the restrictive clause in the contract, Exhibit "A", attached to plaintiff's petition, refers to the race of the person or thing to be buried, rather than to the race of the owner of the lot.

3. That a person alleged to be of eleven-sixteenths Winnebago Indian blood and five-sixteenths white blood is not, as a matter of law, a person of the Caucasian race within the meaning of the term as used in the contract, Exhibit "A".

4. That the action of a State or Federal court in permitting a defendant to stand upon the terms of its contract and to defend this action in court would not constitute state [fol. 42] or federal action contrary to the Fifth Amendment and the Fourteenth Amendment to the United States Constitution, as alleged by plaintiff in amended paragraph 15 of Count I.

5. That the provision of the contract, Exhibit "A", restricting burial privileges to members of the Caucasian race is unenforceable.

6. That the provision in the contract, Exhibit "A", restricting burial privileges to members of the Caucasian race may be relied upon as a defense.

7. That the term "Caucasian Race" as used in the contract, Exhibit "A", is not "ambiguous, unintelligible and meaningless," as alleged in paragraph 18-a of amended Count III of plaintiff's petition.

8. That the United Nations Charter has no legal effect as to the legality or illegality of the provisions of the contract involved herein, or of the rights of the parties thereto.

In District Court of Woodbury County

Application for Permission to Have Interlocutory Appeal to the Supreme Court

Comes now the plaintiff, Evelyn Rice, and in this her application for permission to appeal from an interlocutory ruling of the District Court respectfully states:

1. At the request of the plaintiff and the defendants to the above-entitled cause, the District Court of Iowa, in and for Woodbury County, did on the 8th day of July, 1952 make its separate adjudication of law points in advance of [fol. 43] trial under Rule 105 of the Rules of Civil Procedure.

2. Said adjudication of law points involves matters material to the ultimate disposition of this litigation and involves the essence of the action as to both the plaintiff and the defendants and will materially affect the final decision, and a determination of the correctness of the Trial Court's

adjudication of law points prior to the trial of the case on its merits will better serve the interests of justice.

3. The amount in controversy, as is indicated by the pleadings, exceeds $300.00.

4. All of the defendants, through their attorneys, consent to this interlocutory appeal and stipulation and agree that an order authorizing this appeal may be made without further notice as is shown in the stipulation hereto attached and marked Exhibit "A", and by this reference made a part hereof.

Wherefore, plaintiff prays for an order granting such appeal without further notice or hearing, and further prays that such appeal may be granted on terms advancing it for prompt summation, and that such appeal may be taken without the necessity of a bond being filed, and for such other and further things as to the Court may seem appropriate in the premises.

Dated this ..... day of July, 1952.

[fol. 44] EXHIBIT "A" TO APPLICATION

Stipulation

It is hereby stipulated between Neil R. McCluhan and Kindig & Beebe, attorneys for the plaintiff, and Shull & Marshall and Harper, Gleysteen & Nelson, attorneys for the defendants in the above-entitled cause, as follows:

1. The statements found in plaintiff's application for an order authorizing interlocutory appeal are correct.

2. A copy of said application has been served upon the defendants' attorneys, and they acknowledge receipt thereof and waive any further requirement of notice of said application or of a hearing on said application and do expressly agree and consent to an order being entered immediately authorizing the plaintiff to appeal from the District Court's ruling on the adjudication of law points in advance of trial, and that said adjudication of law points is material to the rights of the parties to this litigation and that it is in the best interests of justice that this interlocutory appeal be allowed.

3. All of the attorneys further agree and consent to advancing this appeal for prompt summation to the Court and that no bond shall be required pending the appeal.

Dated this — day of July, 1952.

IN DISTRICT COURT OF WOODBURY COUNTY

ORDER ON APPLICATION FOR PERMISSION TO APPEAL FROM INTERLOCUTORY RULING—August 2, 1952

Plaintiff's Application for an appeal from an interlocutory order of the District Court adjudicating certain law points under R. C. P. 105, having heretofore been [fol. 45] presented to the undersigned Judge of the Supreme Court of Iowa and by said Judge presented to other members of the Court:

It is ordered that said appeal be and the same is hereby denied.

Done at Sioux City, Iowa, this 2 day of August, 1952.

IN DISTRICT COURT OF WOODBURY COUNTY

DEFENDANT'S SECOND APPLICATION FOR ADJUDICATION OF LAW POINTS—Filed December 6, 1952

Defendants jointly apply to the Court for an adjudication of points of law as follows, and for the following reasons:

1. Defendants request the Court to rule as a matter of law that the publication of the pamphlet referred to in plaintiff's pleading as Exhibit "C" and the nature and character of said pamphlet, and whether or not the said pamphlet and its publication constituted an actionable wrong, presents no jury question and that the Court should hold as a matter of law that the said pamphlet and its publication is not libelous, defamatory or actionable as alleged by plaintiff.

2. Defendants further request the Court to rule that the only issue remaining in this cause is whether or not the moving of the body of Sergeant John Rice as alleged

in plaintiff's pleading violated any rights of plaintiff with resultant damages to her.

3. Defendants further ask the Court to rule that as a matter of law plaintiff may introduce evidence at the trial in support only of issues remaining, and not heretofore [fol. 46] ruled upon adversely to the claims of plaintiff.

In District Court of Woodbury County

Court's Ruling on Defendant's Second Application for Adjudication of Law Points

This Matter comes on for ruling upon application of defendants for adjudication of law points, said application being dated December 6, 1952; plaintiff being represented by her attorneys of record, Kindig & Beebe and Neil McCluhan, and defendants being represented by their attorneys of record, Harper, Gleysteen & Nelson and Shull & Marshall, and the Court having examined said application and heard arguments of counsel in connection therewith, and having taken the matter under advisement:

Now, on this 16th day of December, A. D. 1952, the Court makes the following Findings of Facts, Conclusions of Law and Order;

Findings of Fact

1. The matters upon which this application is based are three in number and will be treated in the order appearing in said application. However, a recital of the background of this case seems appropriate for an understanding of the Court's position on the matters now before it.

2. Originally this case was premised upon an alleged breach of contract, plaintiff contending that restrictions contained in the contract contravened provisions of both the federal and state constitutions, as well as of the United [fol. 47] Nations Charter. Plaintiff further contended that if said restrictions in the contract were void because of the objections raised by plaintiff, then defendant breached said contract to the damage of plaintiff.

3. As elements of damage to plaintiff, the plaintiff alleged as the primary injury to herself, the failure of defendant to inter the remains of her late husband, with resulting damage caused by humiliation, mental distress, etc.; and in addition she alleged that said injuries and resulting damages were increased by (1) moving the body of her deceased husband from the graveside to a building belonging to defendant corporation, and without the consent of plaintiff, and (2) by publication of a pamphlet explaining the incident which was the basis of the lawsuit.

4. The petition does not allege that the moving of the body constituted a tort nor that such moving was wrongful in itself, but only that said moving of the body was one of the elements of damage that resulted to plaintiff from defendant's alleged breach of contract. Likewise, the petition does not allege that the pamphlet circulated was libelous nor defamatory, nor that its publication constituted a tort. Again it is plaintiff's contention only that its publication, though not libelous or defamatory nor wrongful in itself, added to the damage caused by the claimed breach of contract.

5. The Court by previous rulings upon applications for adjudication of law points eliminated from this case the claim by plaintiff of breach of contract, and after said rulings the only matters remaining for determination [fol. 48] were the moving of the body, and the publication of the pamphlet, Exhibit "C". The Court had not previously been asked to rule upon these latter two questions.

6. It appears to the Court, that since the petition does not have a right of recovery upon any claim of tort arising out of either the moving of the body or the publication of the pamphlet, but alleges them only as elements of damage, and plaintiff's counsel adheres to this position and so contends in oral argument to the Court, and with the alleged wrongful act of defendant, to wit: breach of contract, having heretofore been eliminated from the case by ruling of the Court, that nothing remains to submit to a jury or to be determined by a court. If the wrong complained of, that is the breach of contract, is no longer in the lawsuit, there is nothing left upon which to base damages, the allegations of which alone remain in the case.

7. The allegation of wrongdoing having been eliminated

by prior rulings of the Court, such rulings of necessity carried with them the damage it is claimed flowed from said alleged wrongdoing.

8. Had these matters been set forth in separate counts as tort feasance a different result might have obtained. But since it is plaintiff's contention that they constitute merely cumulative elements of damage no allegation of wrongdoing remains in the case, and damages must flow from allegations of wrongdoing on the part of the defendant and cannot be recovered from a mere recital of the damages alleged to have been suffered.

[fols. 49-50] CONCLUSIONS OF LAW

1. The Court Finds that it has full and complete jurisdiction of the subject matter and the parties.

2. That the Application of defendants for adjudication of law points filed by defendants December 6, 1952, should be ruled on by the Court in accordance with the application and request of the defendants.

Wherefore, it is ordered, adjudged and decreed

That, unless plaintiff shall amend her pleadings within seven (7) days hereof as provided by Rule 86, Rules of Civil Procedure, the said cause shall be dismissed at plaintiff's costs.

Plaintiff excepts.

[fols. 51-52] On December 5, 1952 the following was filed:

[fol. 63] Filed September 22, 1953

IN THE SUPREME COURT OF IOWA

Nos. 102, 48304

EVELYN RICE, Appellant,

v.

SIOUX CITY MEMORIAL PARK CEMETERY, INCORPORATED, a Corporation; F. K. LYTLE and J. M. GUNNELL, Appellees

Appeal from Woodbury District Court, Ralph C. Pritchard and Ralph W. Crary, Judges

Action at law for damages for defendants' refusal to bury plaintiff's alleged non-Caucasian husband in a private cemetery burial lot purchased by plaintiff under a contract restricting burial privileges to members of the Caucasian race. The case was decided on rulings on questions of law under Rule 105 R. C. P. in favor of defendants. Affirmed.

Neil R. McCluhan of Winnebago, Nebr., and Kindig & Beebe of Sioux City, for appellant.

Shull & Marshall, and Harper, Gleysteen & Nelson, of Sioux City, for appellees.

[fol. 64] LARSON, J.;

Plaintiff commenced her action for damages against the defendants by filing a petition in three counts, which was later twice amended and still later ordered recast. In a case of the same entitlement found in 102 Fed. Suppl. 658, the petition is set out in full. In this opinion by Judge Graven the case was remanded to the state court for final adjudication on the issues, due to a jurisdictional question. The action against the individual defendants was dismissed below and no appeal is taken from that decision of the court.

Plaintiff in her petition alleges that on or about August 17, 1951, she entered into a written contract "Exhibit A" for the purchase of three cemetery lots belonging to defendant corporation, one lot to be used for the burial of her deceased husband, Sergeant Rice, whose body was be-

ing shipped home from Korea. This contract contains a racial restrictive clause and provides in part as follows:

"M. No. 1335.

Sioux City Memorial Park Cemetery, Inc.

This contract, made at Sioux City, Iowa, on this 17th day of August, 1951, between the Sioux City Memorial Park Cemetery, Inc. (owners and developers of Sioux City Memorial Park, its successors and assigns, Party of the First Part (seller) and Mrs. Evelyn Rice, of Winnebago, Nebr., Party of the Second Part (purchaser), Witnesseth:

"That the said Party of the Second Part agrees to purchase from the said Party of the First Part the following:

Right of Sepulture in and to So. ½ (spaces 4-5 & 6) Lot 58 in Section Veterans, Sioux City Memorial Park, a burial [fol. 65] ground with permanent care as hereinafter provided, a plat of which has been or will be recorded with the Recorder of Deeds in Woodbury County, Iowa, with privilege to exchange said lot before Sepulture for any other unsold lot of the same price and privilege at time of transfer * * *

"This agreement is assignable only with the consent of seller, and burial privileges accrue only to members of the Caucasian race, and before any burial can be made the grave space or spaces so used shall be paid in full.

"This contract is subject to the rules and regulations and by-laws of the Sioux City Memorial Park Cemetery, Inc. The Party of the Second Part agrees to purchase any grave markers necessary from the Party of the First Part. Only bronze markers may be used in said cemetery, and must be purchased from the Party of the First Part subject to its rules and regulations.

"No condition, regulation, or agreement other than those printed hereon or contained in Sioux City Memorial Park Cemetery, Inc. rules and regulations shall be binding upon the seller, and this agreement shall not become effective until executed and approved by an executive officer of the Sioux City Memorial Park Cemetery, Inc."

Plaintiff alleged that her deceased husband, Sergeant John Rice, killed in combat on active duty in Korea, had

1/16 Winnebago Indian blood and 5/16 white blood, and hat defendant cemetery refused to permit the body of her leceased husband to be lowered into the ground, after graveside services were held, caused the body to be removed rom the grave site and advised her that the refusal was ecause "he was not a Caucasian."

Plaintiff further alleged that defendant cemetery pub-ished a pamphlet explaining its action in refusing the urial, which caused her humiliation and suffering. In fol. 66] each count she asked judgment in the sum of $60,-00. The pamphlet filed as Exhibit C is in part as follows:

"The Truth About the Sgt. Rice Incident.

"In fairness to our Lot Owners and the citizens of Sioux ity and vicinity, who are interested in the Memorial Park, e feel that the many false statements that have been pub-shed about this incident should be clarified by a frank tatement of the truth:

"1. Contrary to general belief and newspaper publicity he Sioux City Memorial Park did not solicit the burial f Sgt. Rice.

"Mr. D. T. Boyd, the undertaker of South Sioux City, ebraska, called and made the appointment to meet Mr. en Willey, Sales Manager, at the Park on August 17, 951, after, as we were later informed, they had been rned down by two or three other cemeteries. Mr. Boyd, rs. Rice and her sister (Mrs. Rice and her sister are oth white but married to Indian brothers) met Mr. Willey t the Park and Mrs. Rice purchased three spaces on an stallment basis and arranged for the burial of Sgt. Rice. othing was said about Sgt. Rice being Indian or that Mrs. ice lived on the Indian Reservation when the lot was rchased, or prior to the funeral. On the 18th day of ugust a copy of the contract signed by Mrs. Rice was ailed to her containing the restriction limiting burial to embers of the Caucasian race. The funeral was not held til August 28th. Mrs. Rice had had her copy of the ntract for ten (10) days, which was ample time for her inform herself of its contents and restrictions. Mr. oyd knew, or should have known, about the restriction, as undertaker of this community whose business is dealing

with cemeteries, especially as we have been informed that the burial was turned down by two or three other cemeteries before coming to the Memorial Park. Contrary to [fol. 67] publicity, the service by the Catholic priest at Memorial Park was not interrupted and the family had already left the grave site when Mr. Willey asked the undertaker and was informed that the deceased was an Indian. The body was never lowered into the ground. The first notice the Park had of the fact that the deceased might be an Indian was that practically all of the mourners at the funeral were Indians.

"2. The present Owners and Officers of the Park have no racial prejudice and were not responsible for the restriction to only members of the Caucasian race.

"3. Every contract and deed since the cemetery was started carries this restriction.

"4. Dr. R. S. McNeish of the National Museum at Ottawa, Canada, and other Canadian archaeologists have reported definite proof that American Indians are descended from Wild Mongolian Nomads that came to North America from Asia by way of Alaska. In other words, the American Indian is not of Caucasian descent, to the best of our available information.

"If the burial of Sgt. Rice had been permitted, every Lot Owner in the Park could have recourse against the corporation for damages for breach of contract. The officers of the Park are legally bound to enforce and protect its contracts and contract holders—such proceedings could have financially wrecked the Park. Any removal of this restriction would have to be by agreement of all lot owners, which would be a practical impossibility.

"5. The officers of the Park have never at any time retracted from the position first taken, as they could not legally do so.

"6. The apology so publicized was simply an expression of regret that the officers were legally bound to take the [fol. 68] position they did.

"7. Contrary to reports in the press, the officers of the Park did not offer Mrs. Rice any lot in the Memorial Park. The City Council of Sioux City offered any lot in any Sioux City owned cemetery. Mrs. Rice had already contracted for space in Memorial Park which made such an offer on

behalf of the Memorial Park unnecessary. As she could not legally use the space already contracted for, you can see such an offer would be meaningless. We have had many inquiries as to why we did not publicly defend our position during the height of the publicity that was given to this incident. Our failure to do so was in deference to the request of many business men and citizens of Sioux City who wished to end the publicity as quickly as possible, and also to our knowledge of the fact that under this mob hysteria, any statements made by us, as had been demonstrated, would not be fairly reported.

"8. The restriction to members of the Caucasian race is almost as old as the cemetery business and has come down with the development of the cemetery business. This restriction is in probably 90 per cent of the private cemeteries in the United States, including Forest Lawn in California and Graceland Park in Sioux City. Private cemeteries have always had a right to be operated for a particular group such as Jewish, Catholic, Lutheran, Negro, Chinese, etc., not because of any prejudice against any race, but because people, like animals, prefer to be with their own kind." * * *

"We submit the above for your fair and unbiased appraisal.

The Memorial Park, Sioux City, Iowa."

Both defendants and plaintiff moved for an adjudication of substantially the same points of law under Rule 105 R.C.P. and the court ruled:

[fol. 69] That the social restriction clause in the contract Exhibit A is not void but is unenforceable as a violation of (a) The Fifth Amendment of the United States Constitution; b. The Fourteenth Amendment to the United States Constitution, and (c), Sec. 1 and 6 of Art. I of the Constitution of the State of Iowa; (d) Public Policy of the State of Iowa and of the United States Government;

That the restrictive clause in the contract Exhibit A refers to the race of the person or thing to be buried, rather than to the race of the owner of the lot;

That a person alleged to be 11/16 Winnebago Indian and 5/16 white blood, is not, as a matter of law, a person of the

Caucasian race within the meaning of the term as used in the contract;

That the action of a state or federal court in permitting a defendant to stand upon the terms of its contract and to defend this action in court would not constitute state or federal action contrary to the 5th and 14th amendments to the United States Constitution;

That the acts of the defendants alleged do not constitute a violation of "public policy" as a matter of law;

That the term "Caucasian Race" as used in the contract Exhibit A, is not "ambiguous, unintelligible, and meaningless" and

That the United Nations Charter has no legal effect as to legality or illegality of the provisions of the contract involved herein, or of the rights of the parties hereto.

We denied an application for interlocutory appeal and thereafter on December 6, 1952, defendants made a second application to the district court to adjudicate points of law remaining. The court found this action was originally premised upon an alleged breach of contract, and as elements of [fol. 70] damage, plaintiff listed her injury as humiliation, mental distress, etc. increased by (1) the moving of the body after it was ready to be lowered into the ground, and (2) by the publication of a pamphlet explaining the incident complained of by plaintiff. The court further found no independent tort action involved and having ruled against plaintiff on her claim for breach of contract, there was nothing left upon which to base damages, the only allegation remaining in the petition, after all allegations of wrongdoing were removed, by the court's rulings on points of law. We agree.

Plaintiff relies upon and argues six alleged errors but her main contention is that the court erred in holding, as a matter of law, that the racial restrictive clause in the admitted contract was not void, and that the action of the court in permitting the defendants to stand upon its terms and defend thereunder this action for damages in court would not amount to nor constitute state or federal action contrary to the 5th amendment or the 14th amendment to the United States Constitution or the Constitution of Iowa. (Sec. 1, Art. 1, or Sec. 6, Art. 1).

We shall discuss this contention first and address ourselves to the contract rather than tort features of plaintiff's complaint. The complaint sounding in tort will be later considered.

It is strongly contended by plaintiff that the whole field of law on the subject of restrictive covenants was completely changed by pronouncements of the U. S. Supreme Court in the cases of Shelley v. Kraemer, 334 U. S. 1, 86 S. Ct. 836, 92 L. Ed. 1161, 3 A. L. R. 2d 441, and Hurd v. Hodges, 334 U. S. 24, 68 S. Ct. 847, 92 L. Ed. 1187, which hold in effect that affirmative action of state courts by granting injunctions, specific performance and other active aids to the enforcement of restrictive covenants based on color or race, was state action and violated the 5th and 14th amendments of [fol. 71] the United States Constitution. In this group of cases it is to be noted that the state has lent its power in support of the actions of private individuals or corporations and of course, in so doing has clothed the private acts with the character of state action. While we must recognize an evolution of our society as disclosed by these recent decisions, all of the previous decisions may be distinguished from our present case in that they disclose the exertion of governmental power directly to aid in discrimination, or other deprivation of right. Certainly, that factor is not presented here where the state has maintained neutrality. But plaintiff would have us go one step further than the United States Supreme Court and declare any private contract, which contains any restrictive covenants, void as to the covenants. She is asking more. She asks us to reform the contract voluntarily agreed to with another private party. She asks that we remove the restrictive covenant in her contract which she repudiates and permit her to recover damages from the other party. In other words extend the theory announced in the Shelley v. Kraemer and Hurd v. Hodges cases to indirect as well as direct support of private agreements containing restrictive covenants; to bar the recognition of such clauses in contracts between private parties even though no active aid is given their enforcement. This theory the district court would not adopt and we think properly declined to do so. Our sympathy must not be allowed to carry us to the aid of either party in circumstances of this nature unless the restriction

is clearly one against public policy. It may be desirable to hold that state action can be discerned in any case where the state has tolerated discrimination by inaction, or otherwise, in matters of public importance, and we are in sympathy with the ideals of race equality. But there is danger [fol. 72] in attempting a remedy by such constitutional expansion. Invocation of the constitution then might depend upon a balance of two asserted values—the privilege of the private corporation v. the right of the plaintiff to equality of treatment which is another well known constitutional safeguard. It must be clear that a clash would result between such expansion of the 14th amendment and the decisions of long standing in the civil rights cases. 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835. Both demand that the states protect the rights defined in the amendment against the wrongful actions of private individuals. This most states do by appropriate legislation and it is just and proper that state authorities furnish appropriate means of extending these moral rights into areas when they have not heretofore been asserted, rather than to try an extension of the coverage of the 14th amendment to fields that will abridge other individual rights, and violate other constitutional guarantees.

It is well to mention here that the proper state authority, the 1953 Iowa legislature in Chap. 84, Acts of the 55th G. A. Sec. 1, and Sec. 8, did expand the Iowa civil rights law to cover just such incidents as arose in this case, but it is also worthy of note that by exceptions this legislation did not abridge desirable individual rights of restriction in church and fraternal private burial places. Such proper discretion could not occur under plaintiff's urged expansion of constitutional construction.

It seems to us that the unquestioned value of the present system prescribes the limits to this expanding concept of state action. As said in the case of Dorsey v. Stuyvesant Town Corp., 299 N. Y. 512, 87 N. E. 2d 541, 14 A. L. R. 2d 133, Cert. denied, 339 U. S. 981, 70 S. Ct. 1019, 94 L. Ed. 1385.

"The unquestioned value of that system (state responsibility) suggests the limits to the expanding concept of [fol. 73] state action, which has hitherto been found only in cases where the state has consciously exerted its power

in aid of discrimination or where private individuals have acted in a governmental capacity so recognized by the State."

In order to seek money damages, plaintiff seeks to justify her repudiation of a portion of her contract and recover on a breach of the new agreement, but admits that Iowa had not seen fit to declare such private cemeteries within the "civil right" (Chap. 735, Code 1950) laws of this state. Having named such things as lodging houses, restaurants and places of amusement, the defendants were not acting in violation of Iowa law, and the expression "expressio unius est exclusio alterius" is applicable here.

Our conclusion then must be that the moral ends advanced by plaintiff will not justify the means she sought to obtain them. Defendants cannot be held to answer in damages for its contractual provisions under the equal protection clauses of either Federal or State constitutions. Plaintiff did not strenuously argue that the State constitution in Sec. 1, Art. 1, and Sec. 6, Art. 1, did more than reenunciate the restrictions of the 5th and 14th amendments of the United States Constitution. The problem is the same under each constitution and our decision must necessarily be the same in each case. Prohibitions relating to cases of this kind contained in the 5th and 14th amendments of the U. S. Constitution and the State Constitution, Sec. 1 and 6 of Art. 1, related only to state action. It is clear that state action as referred to here has been only expanded to direct action by the legislative, the executive, the judicial authorities or any person or group exercising a governmental function, to aid in the enforcement of restrictive or discriminating acts or agreements. For the reasons set out we can expand it no further and therefore find no error in the lower [fol. 74] court's determination of these points of law.

II. But plaintiff further urges that the restrictive covenants violate "public policy" and the treaty embodied in the Charter of the United Nations.

It will suffice to say that that treaty has no application to the private conduct of individual citizens of the United States. It is true a principle was enunciated in that treaty but claims or fears that state laws have been abrogated by the provisions of the Charter of the United Nations, have been dissolved by the California

and Michigan courts. In Sipes v. McGhee, 316 Mich. 614, 25 N. W. 2d 638, 644, a case reviewed by the United States Supreme Court, there was a reversal on constitutional grounds but no criticism of the state court's expression as to the general law relative to treaties. The Michigan Supreme Court said: "We do not understand it to be a principle of law that a treaty between sovereign nations is applicable to the contractual rights between the citizens of the United States when a determination of these rights is sought in the state courts. So far as the instant case is concerned, these pronouncements (Art. 55, 56, United Nations Charter) are merely indicative of a desirable social trend and an objective devoutly to be desired by all well-thinking peoples." With this statement we agree.

The Supreme Court of California in 242 P. 2d 617, at 622, 32 Cal. 2d 718, reviewing the decision in Jujii v. State of California, D. C. Appl. 217 P. 481, held: "We are satisfied, however, that the charter (United Nations) provisions relied on by plaintiff were not intended to supersede existing domestic legislation and we cannot hold that they operate to invalidate the Alien Land Law."

We also must come to the conclusion here that desirable as these principles announced in the charter may be, they do not have the force or effect of superseding our state laws relating to contracts, and must therefore hold that [fol. 75] the provisions of the United Nations charter have no bearing on the case before the court.

Plaintiff lays great stress on her claim that a racial restriction in a private agreement such as we have here must be declared void as violating public policy. This is a typical argument in cases of this kind and admittedly has caused courts some difficulty. The greatest of these difficulties is that of determining the meaning of "public policy." Plaintiff refers to several cases where the courts have held against racial discrimination in public schools, in transportation and food establishments, and points to this as Iowa's public policy. A closer examination of these cases discloses that this designated public policy was not set by the courts but by the legislative branch. It is true that in interpreting various civil rights acts, and other police power enactments, the courts do and have expressed the public policy of the state, as is indicated by the people

through the legislature. In the case of Richmond v. Dubuque & Sioux City R. R. Co., 26 Iowa 191, we said: "But further than this, the power of courts to declare a contract void for being in contravention of sound public policy, is a very delicate and undefined power and like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt."

In the case of Liggett v. Shrives, 181 Iowa 260, 164 N. W. 611, 612, we said: "We must look to the Constitution, statutes, and judicial decisions of the state to determine its public policy, and that which is not prohibited by statute, condemned by judicial decision nor contrary to the public morals, contravenes no principle of public policy." See also Sipes v. McGhee, supra.

In general throughout the United States, covenants or agreements restricting real property from ownership or [fol. 76] occupancy by persons of a certain race, or by anyone not of the Caucasian race, have been held not contrary to public policy. See 3 A. L. R. 2d, p. 486 for annotations.

We are in doubt that restrictive clause contravenes sound public policy, and must therefore hold that there has been no such violation of public policy such as would justify the holding of the restrictive agreement void in the contract.

It is fundamental in our law that a private individual may, unless expressly forbidden by police power enactments, deal freely with whom he pleases, and his reasons or policy are not the concern of the state. The state may not aid him in certain of his restrictive or arbitrary agreements, and so here if plaintiff had herself, lowered her deceased husband's body into the ground in violation of her agreement with defendants, the State would have had to deny defendants aid in restraining her, nor could it have helped in punishing her for violating that agreement.

III. Plaintiff further contends that the words used in the contract are not clear, but are ambiguous, and should not have been decided by the court as a matter of law and that certain questions regarding the meaning of the terms used in the contract should have been submitted to the jury. She contends first that the contract restriction refers to the person buying the lot and not to the person to be buried in the lot. Next, she contends, the term "Cauca-

sian" as used in the contract was too vague and indefinite to be enforceable and should have been left to the jury to determine whether or not plaintiff's husband qualified. She also complains that the court should not as a matter of law determine the question of whether one alleged to be of 11/16 Indian blood was or was not a Caucasian under the contract, "Exhibit A".

[fol. 77] We are unable to follow the plaintiff's argument for it is too well settled in this state for further debate that the validity and construction of a written contract agreement is a matter of law for the court to decide and is not a question of fact for the jury.

In 53 Am. Jur. p. 226, §268, we find the general rule as follows: "The question whether a writing is, upon its face, a complete expression of the agreement of the parties is one for the court, and subject to qualifications where the contract is uncertain and ambiguous * * * the general rule is that where a contract has been reduced to writing, its interpretation, construction, or legal effect is for the court and not for the jury. This is true * * * provided the writings express the complete agreement of the parties, and the language used is clear, plain, certain, undisputed, unambiguous, unequivocal, and not subject to conflicting inference, or where the only doubt as to its meaning arises from the language the parties used, and not from intrinsic matters. In other words, where a clear meaning can be ascertained without resort to intrinsic facts, the interpretation of a writing is for the court."

Was the wording of the contract amply clear, plain and unambiguous? It is difficult to believe that the wording of the contract, "* * * burial privileges accrue only to members of the Caucasian race" meant anything else than the race of the one to be buried. Certainly not to the one that purchased the lot. This was the only reasonable determination of the intention of the restrictive clause in this agreement.

[fol. 78] We are also clear that a person of 11/16 Indian blood is as a matter of law not a Caucasian. The word "Caucasian" is not a strictly scientific term but is interpreted according to its generally accepted meaning. It is sufficient to say that one admittedly of 11/16 Indian blood is not a Caucasian and it would have been error to have

submitted the question to a jury. No doubt where the percentage is in question or is disputed, a jury might determine the matter but that is not the fact in this case. We have been cited no authority, nor have we found any, which holds that one having greater than 50% Indian or negro blood is a Caucasian. In re Balsara C. C. 180 Fed. 694, the court said: "We think that the words refer to race and include all persons of the white race, as distinguished from the black, red, yellow or brown races, which differ in so many respects from it. Whether there is any pure white race and what people belong to it may involve nice discriminations, but for practical purposes there is no difficulty in saying that the Chinese, Japanese and Malays, and the American Indians do not belong to the white race."

As popularly understood by the common man a Caucasian and white person is synonymous, and is sufficiently definite to be recognized legally and is not void for uncertainty. Wadia v. U. S., 101 Fed. 2d 7.

We agree with the decision of the district court that the language used in the contract, Exhibit A, was amply clear, certain and unambiguous, and hold that the construction to be placed on the contract was for the court and not for the jury. See Rath v. Schoon, 192 Iowa 180, 182 N. W. 180; Seibel v. Commonwealth Life Ins. Co., 194 Iowa 701, 190 N. W. 173; Comptograph Co. v. Burroughs Add. Machine Co., 179 Iowa 83, 159 N. W. 465; Weitz' Sons v. U. S. [fol. 79] Fid. & Guar. Co., 206 Iowa 1025, 219 N. W. 411. Equitable Life Ins. Co. v. Johnston, 222 Iowa 687, 269 N. W. 767, 108 A. L. R. 257; Hubbard v. Marsh, 241 Iowa 163, 40 N. W. 2d 488; Farrell v. Wallace, 161 Iowa 528, 143 N. W. 488; Lamson v. Horton-Holden Hotel Co., 193 Iowa 355, 185 N. W. 472; 26 A. L. R. 465, 12 Am. Jur. Contracts p. 756, §232.

In Lamson v. Horton-Holden Hotel Co., supra, we said: "No fraud or misrepresentation is charged or proven on either side. * * * If there be neither fraud nor mistake justifying equitable interference, the terms of the contract as written must prevail." A misconstruction of a contract written is a mistake of law and not of fact.

We find here no allegations as to misrepresentation, fraud or deceit in the obtaining or the execution of the agreement between the plaintiff and the defendant corpora-

tion. The only allegation that slightly tends to negative the terms of the written agreement or question the meeting of minds, was an allegation in plaintiff's petition that "the defendant knew or reasonably should have known that Sergeant Rice was a Winnebago Indian." This allegation does not go so far as to claim a waiver of the terms of the written contract, in fact, it does no more than suggest another separate agreement or a misunderstanding of the terms of the later executed agreement.

In Blackledge v. Puncture Proof Retread Co., 190 Iowa 1303 at 1307, 181 N. W. 662, 663, Judge Evans, speaking for the court said: "While it is true as an abstract proposition of law, that an independent oral contract may be entered into between the parties to a written contract, and contemporaneously therewith, it is also true that such oral contract must be independent in fact, and must not be a contradiction, modification, or qualification of the written [fol. 80] contract, either as to its enforcement, its consideration, or its executory obligations."

We have recently held such an allegation as to defendant's knowledge was insufficient and proof thereof improper under the parol evidence rule. Des Moines v. West Des Moines, 56 N. W. 2d, 904-906.

IV. The remaining contention of plaintiff involves her count one, which sounds in tort. Her error, No. 3, contends that the court erred in holding as a matter of law that the question of damage resulting from the moving of the body and for the publication of the pamphlet, Exhibit C, could not be presented to the jury in view of the prior adjudication of law points. The foundation of all of plaintiff's theories of action is a claimed breach of contract between her and the cemetery corporation. After deleting the restricting clause which she claims void, her damage action depends upon defendants' breach and her consequent suffering and damage.

Conduct that is merely a breach of contract is not a tort. The contract, however, may establish a relationship demanding the exercise of proper care, and then a tortious and intentional violation of that requirement might give rise to a tort liability. Peitzman v. City of Ilmo, 141 F. 2d 956; South v. Weber, 70 S. Dak. 232, 16 N. W. 2d 537.

Plaintiff here asks the court to construe the contract in

such a way that defendants' refusal to bury plaintiff's deceased husband could be considered wrongful or tortious. In other words, upon the construction of the relationship of the parties under the contract would depend the question of whether or not a tort had been committed against the [fols. 81-82] plaintiff. Excepting for the contract, the refusal of defendants to bury plaintiff's deceased husband could not in any way be considered wrongful or tortious. It must therefore be clear that unless the contract was reformed by deleting the restrictive clause, whereby defendants would be guilty of an intentional breach of contract, and intentionally committing a wrongful act against plaintiff, under their contract relationship, no tort liability would be incurred by defendants' acts, first in refusing to bury plaintiff's deceased husband, and second, in explaining their alleged right and reasonable action in the pamphlet. No contention is made that plaintiff has stated a cause of action in defamation of character nor did she claim an independent action based upon the removal of the body from the grave site. The court therefore correctly held there was no jury question under an independent tort action, but that recovery under the tort contention depended upon her success in pleading and proving a breach of contract relationship. This being determined adversely to her by the court, her tort claim must also fail.

Affirmed.

All Justices Concur.

[fols. 69-71] IN THE SUPREME COURT OF IOWA

PETITION FOR REHEARING

Comes now the plaintiff-appellant in the above-entitled cause and respectfully petitions the Court for a rehearing on the opinion handed down and filed by the Court on September 22, 1953, which opinion has not as yet appeared in the advance sheets of the North Western Reporter or the official Iowa Reports at the time of the preparation of this petition for rehearing.

The plaintiff-appellant, as a basis for this petition for rehearing, states that the Court erred in its conclusions of law and findings of fact in the following particulars:

1. By holding that the act of the Iowa District Court and of the Supreme Court of Iowa in allowing the defendants-appellees to use the restrictive covenant in question as a defense to an action for damages did not amount to state action prohibited by the equal protection clause of the 14th Amendment to the United States Constitution and Section 1, Article 1, and Section 6, Article 1 of the Constitution of the State of Iowa.

2. By refusing to directly pass upon the question of a violation of the due process clause of the 14th Amendment to the United States Constitution properly raised in all stages of the litigation, or, if this question was indirectly passed upon, by holding that the due process clause of the 14th Amendment to the Constitution of the United States of America was not violated by the conduct of the defendants-appellees and by the conduct of the District and Su-
[fols. 72-83] preme Courts of the State of Iowa in allowing the defendants-appellees to defend against this action for damages by use of the restrictive covenant in question.

3. By holding that the United Nations Charter, as a solemn treaty of the United States Government, has no application to this litigation, and, specifically, that the United Nations Charter does not prevent the Courts of the State of Iowa from allowing the defendants-appellees to defend this action for damages by use of the restrictive covenant in question.

4. By holding that the public policy of the State of Iowa and of the United States of America is not violated by the

District Court of Iowa and the Supreme Court of Iowa when those Courts allowed the defendants-appellees to defend their conduct in an action for damages by use of the restrictive covenant in question.

I

By holding that the act of the Iowa District Court and of the Supreme Court of Iowa in allowing the defendants-appellees to use the restrictive covenant in question as a defense to an action for damages did not amount to state action prohibited by the equal protection clause of the 14th Amendment to the United States Constitution and Section 1, Article 1, and Section 6, Article 1 of the Constitution of the State of Iowa.

[fols. 84-87] IN THE SUPREME COURT OF IOWA

NOTICE OF ORAL ARGUMENT

Notice is hereby given that counsel for the plaintiff-appellant asks to be heard in oral argument on the submission of this cause.

Neil R. McCluhan, Winnebago, Nebraska; Kindig & Beebe, 503 Toy Natl. Bank Building, Sioux City 1, Iowa, Attorneys for Plaintiff-Appellant.

[fol. 88] [File endorsement omitted.]

[fols. 89-93] IN THE SUPREME COURT OF IOWA

RESISTANCE TO PETITION FOR REHEARING—Filed October 30, 1953

Come now, defendants-appellees and resist the Petition of Plaintiff-Appellant herein for Rehearing in the above-entitled cause for the reason that the said Petition and accompanying Brief and Argument fails to state any "manifest error or misapprehension of facts, or application of correct principles of law."

The said Petition makes untrue and unwarranted assumptions of fact, repeatedly begs the questions in issue and is

simply a restatement of claims already fully presented, argued and determined in the opinion of the Court in this case, which appears in Advance Sheets, 60 N. W. 2d, page 110.

[fols. 94-96] IN THE SUPREME COURT OF IOWA

NOTICE OF ORAL ARGUMENT

Notice is hereby given that counsel for Defendants-Appellees ask to be heard in oral argument on the submission of the Petition for Rehearing.

Shull & Marshall, Harper, Gleysteen & Nelson, Attorneys for Defendants-Appellees.

[fol. 85] IN THE SUPREME COURT OF IOWA

No. 4-48304

EVELYN RICE, Plaintiff-Appellant,

vs.

SIOUX CITY MEMORIAL PARK CEMETERY, INC., a Corporation, F. H. Lytle and J. M. Gunnell, Defendants-Appellees.

November 17th, 1953

Petition for Rehearing and Resistance thereto submitted to the Iowa Supreme Court.

November 20th, 1953.

Appellants Petition for Rehearing having been fully considered is hereby denied.

By Supreme Court of Iowa.

I hereby certify that the foregoing is a full, true and complete copy of the order made by said Court in the above entitled cause, as full, true and complete as the same remains on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Des Moines, Iowa, this 19th day of January, A. D., 1954.

Helen O. Galvin, Clerk.

[fol. 99] IN THE SUPREME COURT OF THE UNITED STATES

No. 591

[Title omitted]

STIPULATION—Filed April 23, 1954

It is stipulated between all of the counsel of record that the Clerk, in preparing the printed record for use by the Court and counsel, may eliminate the duplicity of petitions and answers found in the record used in the Supreme Court of Iowa and in the transcript of record previously prepared by the Clerk for use in the petition for a writ of certiorari by deleting therefrom the petition therein printed commencing at Page 4, line 11, and running through Page 13, line 6, and inserting in lieu thereof the composite amended petition shown commencing at Page 44, line 27, and running through Page 55, line 16.

Following the above deletion and insertion, the Clerk is authorized to print the Exhibits "A," "B," and "C" shown commencing at Page 13, line 8, and running through Page 20, line 31.

The Clerk is further authorized to delete all of Pages 21, 22, 23, 24, 25, 26, 27, and the first 20 lines of Page 28 and insert in lieu thereof the joint answer of defendants shown commencing at Page 55, line 25, and running through Page 59, line 11. The Clerk will delete the plaintiff's objection to the amended composite answer appearing on Page 59 and running from lines 13 to 27, inclusive. The Clerk will further delete all material found on Page 43, lines 17 [fol. 100] to 33, inclusive, and Page 44, lines 1 to 21.

Dated this 21st day of April, A. D. 1954.

(S.) Neil R. McCluhan, Winnebago, Nebraska; (S.) Lowell C. Kindig, 503 Toy National Bank Building, Sioux City 1, Iowa, Attorneys for Petitioner.

(S.) Jesse E. Marshall, 1109 Badgerow Building, Sioux City, Iowa; (S.) H. C. Harper, 615 Security Bank Building, Sioux City, Iowa, Attorneys for Respondents.

[fols. 101-102] [File endorsement omitted.]

[fols. 103-104] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1953

No. 591

ORDER ALLOWING CERTIORARI—Filed April 12, 1954

The petition herein for a writ of certiorari to the Supreme Court of the State of Iowa is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

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Supreme Court of the United States

—o—

October Term, 1953

No. 597 54

—o—

EVELYN RICE,

Petitioner,

vs.

SIOUX CITY MEMORIAL PARK CEMETERY, INCORPORATED, A Corporation; F. K. LYTLE, and J. M. GUNNELL

—o—

PETITION FOR WRIT OF CERTIORRI TO THE SUPREME COURT OF THE STATE OF IOWA

—o—

NEIL R. MCCLUHAN,
LOWELL C. KINDIG,
Counsel for Petitioner.
KINDIG & BEEBE,
Of Counsel.

COCKLE PRINTING CO., LAW BRIEFS, OMAHA

Supreme Court of the United States

October Term, 1953

No.....

EVELYN RICE,

Petitioner,

vs.

SIOUX CITY MEMORIAL PARK CEMETERY, INCORPORATED, A Corporation; F. K. LYTLE, and J. M. GUNNELL

PETITION FOR WRIT OF CERTIORRI TO THE SUPREME COURT OF THE STATE OF IOWA

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

Petitioner, feeling aggrieved by the final order and decision of the Supreme Court of Iowa in the case entitled, "Rice v. Sioux City Memorial Park Cemetery," in its decision reported in 60 N. W. 2d 110 and filed September 22, 1953, and its final decision and order overruling peti-

tioner's petition for a rehearing, which final order was entered on November 20, 1953, petitions this Court for a writ of certiorari to the end that the cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgment of said Supreme Court of Iowa be reversed by this Court, and for such further relief as to this Court may seem proper.

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED

Sergeant John Rice, an American Indian, was killed in the service of his country in Korea. When his body was returned to the United States, his widow, the petitioner herein, purchased a burial lot in the Sioux City Memorial Park Cemetery and made funeral arrangements. The grave was opened and funeral services were held in the family church at Winnebago, Nebraska. The corpse, together with the family and friends of the decedent, then proceeded to the burial ground and the casket was placed over the open grave. Graveside services were then held, whereupon this petitioner, other members of the family and friends, left the cemetery and returned to Winnebago. Shortly upon her return home, the petitioner was notified that the cemetery refused to lower the body into the grave because Sergeant Rice was an American Indian and therefore not a member of the Caucasian Race.

Petitioner had signed a contract for the purchase of the cemetery lot in which a paragraph was included re-

stricting burial privileges to members of the Caucasian Race.

International publicity resulted from this incident and shortly thereafter President Truman invited the petitioner to have the body buried at government expense in the Arlington National Cemetery in Washington, which offer was accepted, and, after a great deal more publicity, the services were held and the body buried in Arlington National Cemetery.

A considerable time after this experience, petitioner brought suit against the cemetery and its individual officers in the District Court of Iowa, in and for Woodbury County, claiming damages for humiliation and mental suffering in the sum of $60,000.00 in each of three separate Counts. The cemetery, by answer, claimed its conduct was justified by reason of the restrictive clause in the contract, and petitioner denied that the cemetery could use that clause as a defense.

The cemetery petitioned for removal of the case to the United States District Court for the Northern District of Iowa, and, after hearing, that Court remanded the case to the State Court, and the opinion is recorded at 102 Federal Supplement 658.

Thereupon each side filed an application for the adjudication of law points in advance of trial, and the Trial Court ruled on these points adversely to the petitioner, from which ruling, together with a supplemental ruling on the remaining law points, the petitioner appealed to the Supreme Court of Iowa, and that Court, being the Court of last resort in the State of Iowa, sustained the

Trial Court in all respects. Petitioner then filed her petition for a rehearing, which petition was denied on November 20, 1953.

Throughout the entire proceedings petitioner has properly pleaded and urged that for the Iowa Courts by their rulings to allow the cemetery to hide behind the restrictive covenant in the contract is an act by the State which is in violation of both the equal protection and the due process clauses of the Fourteenth Amendment to the United States Constitution; the letter and spirit of the United Nations Charter; and the public policy of the United States Government.

———o———

STATEMENT AS TO JURISDICTION OF THE UNITED STATES SUPREME COURT ON THE WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OR DECREE IN QUESTION

(a) This is a petition for a writ of certiorari brought under the provisions under 62 Statutes 929, 28 U. S. C. A., Section 1257(3), in a case where right, title, privilege. or immunity are claimed under the United States Constitution and under a treaty of the United States Government.

(b) The constitutional provisions, involving both the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution, have been pleaded and are directly involved, and the United Nations Charter as a treaty of the United States Government likewise has been pleaded and is directly involved in this litigation, and both were directly passed upon ad-

versely to this petitioner by the District and the Supreme Courts of Iowa.

In Count I of the original petition there was a direct reference to the acts of the cemetery being in violation of the Fourteenth Amendment (R. p. 8, ll. 15-19); the same proposition was raised in Count II of the original petition (R. p. 9, ll. 29-34; p. 10, ll. 1-3); subsequently, in the first amendment to her petition, she specifically alleged, "Should a State Court condone the defendants' conduct, it would violate the Fourteenth Amendment to the Constitution of the United States." (R. p. 24, ll. 6-9.) And the same amendment was made to Count II of the original petition (R. p. 24, ll. 14-34); a second amendment was thereupon filed raising the problem of public policy of the United States and the United Nations Charter (R. p. 27, ll. 14-30). To the petition as thus twice amended, the cemetery answered by denying the above allegations and sought to dismiss the action (R. p. 25, ll. 25-34; p. 26, ll. 1-34; p. 27, l. 1; p. 28, ll. 1-20).

Thereupon the constitutional and treaty provisions were more directly raised by the petitioner and by the cemetery by application for adjudication of law points prior to trial (R. p. 30, ll. 1-12; ll. 29-34; p. 31, ll. 1-7; ll. 23-34; p. 32, ll. 17-29). Thereupon the Trial Court directly ruled contrary to the petitioner's assertions (R. p. 33, l. 12 to p. 36, l. 21).

Thereafter an application was made for adjudication of the remaining law points not here involved, and the ruling was adverse to the petitioner. Whereupon she appealed to the Supreme Court of Iowa.

In the appeal to the Supreme Court of Iowa the appellant's brief, under Assignment of Error No. 4 on page 6 thereof, raised the question of whether the restrictive covenant could be relied upon as a defense because:

(a) Such action by the Court violated the Fourteenth Amendment to the United States Constitution.

(b) Such action by the Court violated the public policy of the United States, and

(c) Such action by the Court violated the United Nations Charter.

And in Assignment of Errors Nos. 5 and 6 on page 7 of said appellant's brief, the questions of public policy and the United Nations Charter were specifically raised.*

This case was orally argued, and under date of September 22, 1953 the Supreme Court of Iowa filed its written opinion reported in 60 N. W. 2d 110 and found in the printed Record on pages 63 to 77, inclusive. The Iowa Court directly discusses and passes upon the Constitutional, the public policy, and the United Nations Charter questions, and the decision was in all respects adverse to this petitioner (R. p. 68 to 73, incl.).

Whereupon this petitioner filed her petition for a rehearing, which is set out in its entirety in pages 80 to 95 of the printed Record, and in said petition for rehearing she specifically challenged the following rulings of the Court:

---

* We have been unable to supply the Court with ten copies of the complete set of the briefs and arguments filed by both parties in the Iowa Supreme Court, but we have filed with the Clerk ten copies of the Appellant's Brief, together with one complete set showing the appellee's resisting brief, and the appellant's reply brief filed in the Supreme Court of Iowa, and the Court will observe that the constitutional, public policy, and treaty points were directly and substantially raised throughout the proceedings.

1. That allowing the cemetery to use the restrictive covenant as a defense did not amount to State action prohibited by the equal protection clause of the Fourteenth Amendment.

2. That the ruling of the Court did not violate the due process clause of the Fourteenth Amendment and that the Iowa Supreme Court did not directly pass upon the due process question as raised by the petitioner.

3. That the United Nations Charter does not prevent the Courts of the State of Iowa from allowing the cemetery to defend this action for damages by the use of the restrictive covenant, and

4. By holding that the ruling allowing the cemetery to defend by use of the restrictive covenant did not amount to a violation of the public policy of the United States (R. pages 80 and 81).

To this petition for a rehearing the cemetery filed its resistance (R. p. 96 to 104, incl.) and directed its resistance to the foregoing propositions.

Thereafter, under date of November 20, 1953, this petition for a rehearing which had been orally argued was denied (R. p. 105).

It can thus be seen from the original petition, as amended, and the answer thereto, and from the request for and ruling upon an adjudication of law points properly raised, and from the errors relied upon for reversal in the appeal to the Iowa Supreme Court, the Federal questions have been consistently and properly raised at all stages in the proceeding and directly passed upon.

If the cemetery can successfully use the restrictive covenant as a defense to this damage action, then the

petitioner has no cause of action, and the question of whether that defense may be raised and condoned or approved by ruling of the Courts of the State of Iowa can be resolved only by an interpretation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution by reference to the statutes, the Constitution, and the Federal Court decisions to determine the public policy of the United States Government, and finally by an interpretation of the effect which the United Nations Charter has upon the Courts of Iowa in an action of this kind.

The Federal questions are not only substantial and directly and necessarily involved in the determination herein sought to be reviewed, but they are also of great public importance.

THE QUESTIONS PRESENTED ARE WHETHER THE DISTRICT AND SUPREME COURTS OF IOWA ERRONEOUSLY RULED THAT THE CEMETERY CAN USE THE RESTRICTIVE COVENANT AS A DEFENSE TO THIS DAMAGE ACTION WITHOUT SUCH RULING BECOMING A STATE ACTION IN VIOLATION OF

(1) The due process clause of the Fourteenth Amendment to the United States Constitution.

(2) The equal protection clause of the Fourteenth Amendment to the United States Constitution.

(3) The Preamble and Chapter 1 (Article 3), Chapter 4, Article 13-b, and Chapter 9, Articles 55 and 56 of the United Nations Charter.

(4) The public policy of the United tates Government.

The District and Supreme Courts of Iowa have directly ruled negatively on all four of the above propositions.

THE REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

We believe that the writ should be allowed because:

(1) A direct ruling on the application of the Fourteenth Amendment to the United States Constitution has been made by the District and Supreme Courts of Iowa.

(2) A direct ruling on rights arising under the United Nations Charter, which is a treaty of the United States Government, has been made by the District and Supreme Courts of Iowa.

(3) A direct ruling on and interpretation of the public policy of the United States Government, has been made by the District and Supreme Courts of Iowa.

(4) In each of the above three instances the ruling has been adverse to the rights of this petitioner and contrary to principles established by this Court in somewhat similar cases.

(5) The precise question of whether a restrictive covenant may be successfully raised as a defense to a damage action has never before been determined by this Court, and the decision by the Iowa Courts is contrary

to the established principles and decisions and is a federal question of considerable substance and great public importance.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1953

No. [redacted] 28

EVELYN RICE,

Petitioner,

vs.

SIOUX CITY MEMORIAL PARK CEMETERY, INCORPORATED, A Corporation; F. K. LYTLE, and J. M. GUNNELL

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

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BRIEF IN SUPPORT OF PETITION

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Supreme Court of the United States

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

OPINIONS DELIVERED IN COURTS BELOW

The decision of the Supreme Court of Iowa herein sought to be reviewed may be found in 60 N. W. 2d 110 (Iowa 1953).

The decision of the United States District Court remanding the case to the State Court may be found in 102 Federal Supplement 658.

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

1. This is a case where rights and privileges are claimed under the United States Constitution and under a treaty of the United States Government properly pleaded in all stages of litigation.

2. The District and Supreme Courts of Iowa have made a direct interpretation and application of the Fourteenth Amendment to the United States Constitution adverse to the rights of this petitioner and contrary to the principles hereinbefore established or indicated by this Court.

3. The District and Supreme Courts of Iowa have made a direct ruling on and interpretation of the applicability of the United Nations Charter, which is a treaty of the United States Government, and such ruling was adverse to the rights of this petitioner and contrary to the principles indicated by this Court, and contrary to a fair interpretation of the United Nations Charter and its purposes.

4. The District and Supreme Courts of Iowa have interpreted and ruled on the public policy of the United States Government adverse to the rights of this petitioner and contrary to the pronouncements of that policy by this Court.

5. The precise question of whether a restrictive covenant may be successfully raised as a defense to a damage action has never before been determined by this Court, and the decision by the Iowa Courts is erroneous and is

a Federal question of considerable substance and great public importance.

STATEMENT OF THE CASE

Petitioner signed a written contract with the cemetery for the purchase of burial lots (R. 13), one of which was to be used for the burial of her husband, Sergeant John Rice, who had been killed in the Korean War. A clause in this contract restricted burial privileges to members of the Caucasian Race (R. 14). Sergeant Rice was 11/16 Winnebago Indian.

The body was returned from Korea, funeral arrangements were made and funeral services were had in the church at Winnebago, and the funeral procession then proceeded from Winnebago to the Sioux City Memorial Park Cemetery where graveside services were held; whereupon the family and friends left the cemetery and returned to their home, leaving the casket over the open grave and with the belief that it would be buried (R. 5, 6). Thereafter petitioner was notified that the cemetery refused to permit the burial because her husband was not a member of the Caucasian Race (R. 6). Shortly thereafter the cemetery asked petitioner to sign an affidavit stating that her husband was a member of the Caucasian Race, and she refused (R. 7). Thereupon the President of the United States intervened and an offer was made and accepted to have the body sent to Arlington National Cemetery in Washington where the final services were held (R. 7).

On December 12, 1951 petitioner filed her damage action in the District Court of Iowa, in and for Woodbury County, seeking damages for mental suffering and humiliation caused by the acts above recited (R. 4). Thereupon the cemetery sought removal to the Federal Court, and, after a hearing, the case was remanded to State Court. See 102 Fed. Supp. 658. Thereupon the cemetery filed its answer (R. 21, 22, 23) and petitioner filed her first amendment to her petition (R. 23, 24, 25). The cemetery then filed its motion to dismiss the plaintiff's petition as amended and in the alternative filed its answer (R. 25, 26, 27). Petitioner then filed her second amendment to her petition (R. 27, 28) which was answered by the cemetery (R. 28). The Trial Court then overruled the cemetery's motion to dismiss (R. 28, 29). Thereupon both parties sought an adjudication of law points prior to trial (R. 29, 30, 31, 32, 33). The Court did adjudicate the law points (R. 33, 34, 35, 36). In this adjudication of law points the Trial Court held that the action of the State or Federal Court in permitting the cemetery to defend on the basis of the restrictive covenant is not a violation of the Fifth or Fourteenth Amendments to the United States Constitution (R. 34, 35, 36). Also the Trial Court specifically ruled that the restrictive clause in the contract could be relied upon as a defense by the cemetery (R. 36). The Trial Court also ruled that the United Nations Charter has no legal effect on the rights of the parties to this litigation (R. 36). The question of the applicability of the Fifth and Fourteenth Amendments to the United States Constitution and of the United Nations Charter and the public policy of the United States have been prop-

erly pleaded and were accordingly acted upon (R. 23, 24, 25, 27).

Following the adjudication of law points adversely to the rights of this petitioner, a second adjudication of the remaining law points not here involved was made adversely to this petitioner (R. 39-43, incl.). Thereafter appeal was taken to the Supreme Court of Iowa, and that Court affirmed the Trial Court in all respects and held that the cemetery can raise the restrictive covenant as a defense to this action and that such a ruling does not become such a state action as is in violation of the Fourteenth Amendment to the United States Constitution or the United Nations Charer or the public policy of the United States Government (R. 63). Thereafter petitioner filed her petition for a rehearing (R. 78), and that rehearing was denied after oral argument (R. 105).

—o—

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED

The ruling of the Supreme Court of Iowa that the cemetery can use the restrictive covenant as a defense to this damage action becomes such state action as is in violation of:

(1) The due process clause of the Fourteenth Amendment to the United States Constitution.

(2) The equal protection clause of the Fourteenth Amendent to the United States Constitution.

(3) The Preamble and Chapter 1, Article 3, Chapter 4, Article 13(b), and Chapter 9, Articles 55 and 56 of the United Nations Charter.

(4) The public policy of the United States Government.

———o———

ARGUMENT

MAY IT PLEASE THE COURT:

A summary of this argument is that, while the use of the restrictive covenant in a contract between private individuals or a private corporation and an individual is not void or illegal or prohibited by any constitution, treatries, or laws, yet, nonetheless, that same racially restrictive covenant cannot be used either affirmatively or negatively, either directly or indirectly, once voluntary adherence to its terms has disappeared and the matter is before either the Federal or the State Courts.

It is argued here specifically that for a State Court to allow such a racially restrictive covenant to be used as a defense to this damage action amounts to and is the giving of a stamp of approval by the State Court to the racially restrictive covenant, and such approval becomes an act of the State in contravention of petitioner's rights under the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, under the United Nations Charter, which is a treaty of the United States Government, and under the public policy of the United States.

We urge further that such conduct by the Supreme Court of the State of Iowa is equally offensive to the Constitution, treaty, and policy of the United States Government as would be their conduct in specifically enforc-

ing such a covenant or in allowing damages to be recovered for a violation of such a covenant.

We conclude by showing that discrimination because petitioner, a white woman, married an American Indian is the only logical result of the Court's ruling.

The first proposition to which we direct the Court's attention concerns the Iowa Court's interpretation and application of both the due process and the equal protection clauses of the Fourteenth Amendment to the United States Constitution to the facts involved in this litigation.

The gist of the Iowa Court's ruling is that, in the instant case, the Court has maintained neutrality and the State of Iowa has not lent its support to the racially restrictive covenant in question, and that to hold as the peitioner asked them to would result in a dangerous expansion of the Fourteenth Amendment. *Rice v. Memorial Park Cemetery,* R. 69, 70, 71. To this pronouncement petitioner states, first, that the State of Iowa has by this ruling given its stamp of approval and vitality to the racially restrictive covenant in question; and, further, that we are not seeking any dangerous extension of the Fourteenth Amendment but are seeking only to apply the established rules interpreting the Fourteenth Amendment.

The Fourteenth Amendment is to be construed liberally because it refers to rights of persons and property. *Byars v. United States,* 273 U. S. 28.

> "The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the en-

joyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind."

Shelley v. Kraemer, 334 U. S. 1 at 23.

As stated in the case of *Hurd v. Hodge*, 334 U. S. 24, the question of a violation of the Constitution (in that case referring to the Fifth Amendment) is to be determined "not for any narrow technical reason, but for considerations that touch rights so basic to our society that, after the Civil War, their protection against invasion by the States was safeguarded by the Constitution."

Starting then with this fundamental and unswerving rule that the due process and equal protection clauses are to be construed liberally to effect their purposes, we turn to the applicable decisions concerning racially discriminative covenants, and again we find that the Iowa Court has not only refused to give a broad interpretation to the Fourteenth Amendment but it has also ignored the clear mandate of recent decisions by this Court.

Commencing in 1948 new and vital strength was given to the equal protection clause of the Fourteenth Amendment in the case of *Shelley v. Kraemer*, 334 U. S. 1, and to the Fifth Amendment in *Hurd v. Hodge*, 334 U. S. 24. In both of these cases this Court held that judicial sanction of a racially discriminatory covenant in a deed by means of specific performance is prohibited by the Fourteenth Amendment as it pertains to state action and by the Fifth Amendment as it pertains to federal action. In

those decisions—both of which refuse to pass upon the due process question because it was not necessary—the Court gave life to the broad meaning and purpose of the Constitutional Amendments in question and found no difficulty in holding that a decree of specific performance would amount to state action in the *Shelley* case prohibited by the Fourteenth Amendment under the equal protection clause, and in the *Hurd* case that a similar decree by a Federal Court would constitute a violation of the applicable provision of the Fifth Amendment.

Litigants and attorneys then attempted to confirm the decision in those cases by claiming that a violation of the racially restrictive covenant in a deed would give support to an action for damages and that, if a State Court would allow the recovery of such damages, it would not constitute state action prohibited by the Fourteenth Amendment. *Phillips v. Naff*, 52 N. W. 2d 158 (Mich.). And similar attempts in other states were finally resolved by this Court in the case of *Barrows v. Jackson*, 346 U. S. 249, decided by this Court on June 15, 1953. In *Barrows v. Jackson* this Court held that, if a state were to allow damages to be recovered for violation of a racially restrictive covenant, that would amount to state action prohibited by the Fourteenth Amendment. This Court stated that the allowance of damages would be "solely for the purpose of giving vitality to the restrictive covenant; that is to say, to punish respondent for not continuing to discriminate against non-Caucasians * * *." This Court then indicated that it would not allow a State Court to accomplish indirectly what it could not accomplish directly under the *Shelley* case or what could not be

enforced in the federal jurisdiction because it would be contrary to public policy under the *Hurd* case.

It therefore appears that the Iowa Court has closed its eyes to the true policy announced by this Court in the *Shelley* and *Hurd* cases and so recently announced by this Court in the *Barrows* case and has refused to follow the final rulings by this Court as to the true meaning of the equal protection clause in the Fourteenth Amendment. If some would say that the instant case is one step removed from the *Shelley* and *Hurd* cases, they are closing their eyes to the reality and full meaning of the cases hereinabove cited and are giving a narrow technical construction to the Fourteenth Amendment when instead they should be giving it a liberal one. In all events, it is but a logical step to go from the *Barrows* case to the instant one and realize that the Iowa Court's ruling likewise has given vitality to the restrictive covenant, even though it may have done so by indirection.

If petitioner is to lose this action as she has in the Iowa Courts, it is because of a racially restrictive covenant which, under the *Shelley, Hurd,* and *Barrows* cases, cannot be given life directly or indirectly by a State or Federal Court. Conversely, if the cemetery is to win as it has in the Iowa Courts, it is because it may use this racially restrictive covenant as a shield to defend against what would otherwise make them respond in damages to one who had married a non-Caucasian. The Iowa Court has admitted that it could not specifically enforce this restrictive covenant, as has the cemetery, because of *Shelley v. Kraemer.* The *Barrows* case was not before the Iowa Court, but, since it has been decided, the Iowa Court

now would likewise have to hold that no damages could be recovered by the cemetery for violation of this racially restrictive covenant. It is but a logical conclusion and sequence to state that neither should the Iowa Court hold that the cemetery can use the objectionable covenant as a defense in any of the three situations. The claim to a justification for the conduct objected to stems from a racially restrictive covenant so, if the rights of the parties are to be determined on the strength of such a covenant, it is equally objectionable whether it be by direct or indirect action, and that is precisely what the *Barrows* case held and what the Iowa Court should have held here.

We direct the Court's attention to the fact that rights under the due process clause have not as yet been determined in cases of this type, and we would suggest that if, for any reason, there is some hesitation concerning the applicability of the equal protection clause, then this might be the appropriate place for a determination under the due process clause that the State Courts of Iowa have violated the rights and privileges guaranteed to petitioner.

It is inescapable that the Iowa Court has given vitality to a legally offensive covenant and has given judicial sanction to discrimination.

The next proposition to which we address our remarks is that the Iowa Court has directly ruled upon and interpreted the United Nations Charter in a manner adverse to the rights of this petitioner and contrary to a fair interpretation of the Charter and its purposes and contrary to law.

The gist of the Iowa Court's holding is that the treaty has no application to the private conduct of individual citizens of the United States and that the treaty does not supersede the Iowa laws relating to contracts and that, consequently, the Charter had no bearing on the case (R. 71, 72).

Petitioner does not urge that the Charter, or any other treaty, is intended to affect the private conduct of individuals any more than is the Constitution. We do not urge that the cemetery's conduct violated the United Nations Charter, nor do we say that the cemetery's conduct violated the Constitution. If petitioner had voluntarily acquiesced in the conduct of the cemetery, or if the petitioner and the cemetery voluntarily acquiesced in and complied with the terms of the restrictive covenant, no one would complain and they would not be violating a law or a treaty. But here there is no voluntary acquiescence and, because one of the parties has refused to comply with the racially restrictive covenant on a voluntary basis, the matter has been presented to Court and the question is whether the Iowa Court has violated the United Nations Charter.

Under Article 6 of the United States Constitution, treaties become the supreme law of the land and the judges in every state are bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

For the Iowa Court to say that a treaty does not abrogate state laws is completely erroneous and contrary to the written words of the Constitution.

The question rather is whether the United Nations Charter, which is a solemn treaty of the United States Government, has some provisions which control the Iowa Courts in this case.

The United Nations Charter in its *Preamble* recites as follows:

> "We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom, and for these ends to practice tolerance and live together in peace with one another as good neighbors, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples, have resolved to combine our efforts to accomplish these aims. * * *"

Turn then to *Chapter 1, Article 1,* Subparagraphs (2) and (3), and we find as follows:

> "The Purposes of the United Nations are: * * *
>
> "2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

"3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; * * *"

Turning then to *Chapter IX, Articles 55 and 56* of the Charter we find the following:

"Article 55

"With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of people, the United National shall promote; * * *

"c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

"Article 56

"All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

We will come back to the wording of the Charter, but first we should like to discuss the applicable rules for the interpretation and effect of treaties. Perhaps the leading case is *Missouri v. Holland*, 251 U. S. 415, wherein Mr. Justice Holmes, referring to the Migratory Bird Treaty between the United States and Canada after a Congressional attempt at control was declared unconstitutional, said in part:

"Acts of Congress are the supreme law of the land only when made in purusance of the Constitution, while treaties are declared to be so when made under the authority of the United States. * * * We do not mean to imply that there are no qualifications to the treaty-making power; but that must be ascertained in a different way. * * * and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found. * * * *No doubt the great body of private relations usually falls within the control of the state, but a treaty may override its power.*" (Emphasis ours.)

It has been held that treaties are to be taken in their ordinary meanings as understood in the public law of nations and not any artificial or special sense impressed upon them by local law.

Santovincenzo v. Egan, 284 U. S. 30.

Geoffrey v. Riggs, 133 U. S. 58.

United States v. D'Auterive, 10 Howard 609, 13 Law Ed. 560.

Treaties should be so construed as to uphold the sanctity of public faith.

Ward v. Race Horse, 163 U. S. 504.

And in construing a treaty, its history should be consulted.

Cook v. United States, 288 U. S. 102.

Words with plain meaning cannot be rejected as surplusage.

Foster v. Neilson, 7 Law Ed. 415.

Treaties are to be construed in a broad and liberal spirit and, where it fairly admits of two constructions, that one is preferred which enlarges rather than limits rights which may be claimed under such treaty.

Shanks v. DuPont, 7 Law Ed. 666.

Jordan v. Tashiro, 278 U. S. 123.

Asakura v. Seattle, 265 U. S. 332.

Geoffrey v. Riggs, 133 U. S. 58.

Bacardi Corp. v. Domenach, 311 U. S. 150.

Treaties are to be construed more liberally than private agreements, and it is permissible to look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.

Choctaw Indians v. United States, 318 U. S. 423.

Because treaties are solemn obligations entered into between nations for the interest of civilization, and as their main object is to avoid war and secure a lasting peace and promote a friendly feeling, they should be interpreted in that broad and liberal spirit which is calculated to make for the existence of a perpetual amity.

Tucker v. Alexandroff, 183 U. S. 424.

We are then required to give a broad and liberal interpretation to the United Nations Charter in determining what effect, if any, it has in the instant case. It is not an answer to say that we are seeking a dangerous extension of treaty-making powers and encroaching upon the private conduct of individuals. If the treaty requires that the Courts in Iowa prevent racial discrimination,

then the Iowa Courts must do so, regardless of how they may personally feel. If the applicable portions of the Charter which we have hereinabove quoted indicate that the United States Government considers that one of the basic causes of war is racial discrimination within its own borders, as well as within the borders of other countries, and enters into a solemn treaty announcing that to be a fact, then it becomes a supreme law of the land and under Article 6 of the Constitution it is binding upon the Courts of Iowa.

We state that the United Nations Charter is the condensation of the highest thoughts and ideals of the greatest minds in the world honestly seeking to prevent another holocaust such as the one from which we had just emerged at the end of World War II when the Charter was entered into. As indicated by the Preamble and by the other provisions quoted, it is important to promote self-respect of individuals and to prevent racial discrimination in any way, and, accordingly, each of the member nations bound themselves under Article 55 to promote and in Article 56 to take joint and separate action for the achievement of the purposes therein set out.

This is not a novel suggestion and has been discussed in the Courts in *Perez v. Lippold,* 32 Cal. 2d 711; *Namba v. McCourt,* 153 Ore. 579, 204 Pac. 2d 569; *Curran v. City of New York,* 77 N. Y. S. 2d 206; *Fujii v. California,* 242 Pac. 2d 617, and *Oyam v. California,* 332 U. S. 632. See also 34 Ia. L. Rev. 1.

In the *Oyam* case special concurring opinions were filed by Mr. Justice Murphy, Mr. Justice Rutledge, and Mr. Justice Black. We quote:

"Moreover, this nation recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, and religion. The Alien Land Law stands as a barrier to the fulfillment of that national pledge. Its inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned.

"There are additional reasons why that law stands as an obstacle to the free accomplishment of our policy in the international field. One of these reasons is that we have recently pledged ourselves to cooperate with the United Nations to promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?"

Slightly paraphrasing these two separate quotations from the concurring opinions of the *Oyam* case, we urge that the purposes of the United Nations Charter cannot be fulfilled if the racially restrictive covenant in question can be used as a defense to the conduct of the cemetery. If the cemetery is to prevail, it is because petitioner married an American Indian rather than a member of the Caucasian Race. It logically must follow that, while the cemetery could not avoid the payment of damages if it had acted in a similar fashion against one whose husband was a member of the Caucasian Race, yet, nonetheless, it can avoid the payment of damages to this petitioner because of an interracial marriage. The Iowa Court

is tolerating this discrimination and, at least indirectly is punishing this petitioner because she married a non-Caucasian. The Iowa Court has therefore violated the basic and very fundamental concepts of equality not only announced but also pledged by the United Nations Charter and all of the member nations of which the United States is one.

The United Nations Charter does prohibit the Iowa Court from allowing the cemetery to raise a racially discriminatory covenant as a defense to this action.

Finally we direct our argument to the proposition that the racially restrictive covenant in question and the action of the Iowa Courts in allowing it to be used as a defense is clearly contrary to the public policy of the United States, and we do not need to search far to find that public policy.

The first and clearest indication is the United States Constitution itself, and with particular reference to the Fourteenth Amendment under the equal protection clause. Another clear pronouncement of public policy can be found in the *Civil Rights Act,* 8 U. S. C. A. 41, et seq., and, while the petitioner is not claiming a right under that Act, nonetheless, it is a pronouncement by the United States Congress indicating a public policy against racial discrimination. The next place where the public policy is clearly defined is in the decisions of the United States Supreme Court, with particular reference to the *Shelley, Hurd,* and *Barrows* cases hereinbefore cited. If further search is needed, we again find a pronouncement of the public policy of the United States Government in the

United Nations Charter under the sections thereof hereinbefore set out.

The Iowa Court admitted some difficulty in answering this phase of our argument, but ultimately decided that, since they were in some doubt, they would therefore not extend public policy far enough to assist the petitioner in this case.

We consider that the public policy of the United States is clearly defined and does not need any extension to apply to the facts of this case.

Once more we reiterate that we are not urging that the public policy or the Constitution or the United Nations Charter or the decisions of this Court are intended to control the contracts voluntarily made and adhered to between individuals. We are not saying that the cemetery cannot have such a restrictive clause in its contract, nor are we saying that the cemetery cannot refuse to sell lots to everyone not a member of the Caucasian Race.

> *Dorsey v. Stuyvesant Town Corp.*, 299 N. Y. 512, 87 N. E. 2d 541, 14 A. L. R. 2d 133; certiorari denied 339 U. S. 981.

What we are urging is that, where there is no longer any voluntary adherence and the matter comes before the State Courts, then the public policy of the United States controls those State Courts.

This Court has specifically stated that the public policy of the United States is to protect basic human rights against discriminatory action.

> *Hurd v. Hodge*, 334 U. S. 24, 35, 36.

CONCLUSION

That petitioner is being discriminated against because she married an American Indian cannot logically be denied. The restrictive clause in the very contract in question is racially discriminatory in so many words. The cemetery did, in fact, discriminate against the petitioner and must rely upon the very discriminatory clause in question to avoid a trial on the merits before a jury in this suit for damages. The cemetery so far, with the rulings of the Iowa Courts, has been successful in avoiding such a trial by waving the discriminatory covenant before the judicial eyes of the Iowa Courts which have then said that such a clause is a valid defense to this action. All attempts to discount the discrimination by the Iowa Courts must fail. If petitioner cannot try her case on its merits to a jury, it will be solely and only because the Iowa Courts have given vitality to the restrictive covenant in question by allowing the cemetery to use it as a defense.

The federal questions are substantial, the precise question has never before been decided, and it is therefore respectfully submitted that this Court has jurisdiction and good reason to grant the writ and review the decision of the Iowa Court.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1954

No. 28

EVELYN RICE,

Petitioner,

vs.

SIOUX CITY MEMORIAL PARK CEMETERY, INCORPORATED, A Corporation; F. K. LYTLE, and J. M. GUNNELL,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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COCKLE PRINTING CO., LAW BRIEFS, OMAHA

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Supreme Court of the United States

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Respondent.

PETITIONER'S BRIEF ON THE MERITS

OPINIONS DELIVERED IN COURTS BELOW

The opinion of the Supreme Court of Iowa herein being reviewed is reported in 60 N. W. 2d 110 (Iowa 1953).

The decision of the United States District Court for the Northern District of Iowa, Western Division, remanding the case to the State Court is reported in 102 Federal Supplement 658.

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Certiorari was sought and has been granted under the provisions of 62 Statutes 929; 28 U. S. C. A., Section

1257(3) where right, title, privilege, or immunity are claimed under the United States Constitution and under a treaty of the United States Government. On November 20, 1953 the Supreme Court of Iowa, being the Court of last resort, denied the petitioner's petition for a rehearing (R. 48). On February 15, 1954 petition for a writ of certiorari was filed in this Court, and on April 12, 1954 this Court granted certiorari (R. 50).

The specific grounds on which jurisdiction of this Court is invoked are:

1. The case involves rights and privileges claimed under the United States Constitution and under a treaty of the United States Government properly pleaded in all stages of litigation.

2. The Iowa Court has directly and erroneously interpreted the Fourteenth Amendment to the United States Constitution adversely to this petitioner.

3. The Iowa Court has directly and erroneously interpreted the applicability of the United Nations Charter, a treaty of the United States Government, adversely to this petitioner.

4. The Iowa Court has directly and erroneously interpreted the public policy of the United States Government adversely to this petitioner.

5. The precise question of whether a racial restrictive covenant may be successfully raised as a defense to a damage action has never before been determined by this Court, and the decision by the Iowa Court is erroneous and presents a federal question of considerable substance and great public importance.

CONSTITUTIONAL AND TREATY PROVISIONS INVOLVED

(a) "* * * this constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding * * *."

Article VI, Constitution of the United States.

(b) "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; or deny to any person within its jurisdiction the equal protection of the laws."

Sec. 1, Amendment 14, Constitution of the United States.

(c) The Preamble and Chapter I, Article 1, Subparagraphs 2 and 3, and Chapter IX, Articles 55 and 56, United Nations Charter.[1]

(d) Civil Rights Act, 8 U. S. C. A. 41, et seq. 8 U. S. C. A., Sec. 42, et seq., 2 F. C. A., Title 8, Sec. 42.[2]

———o———

QUESTIONS PRESENTED FOR REVIEW

The questions presented are whether the Supreme Court of Iowa erroneously ruled that the respondent cem-

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1 Set out verbatim in the Appendix.
2 Set out verbatim in the Appendix.

etery can use a racial restrictive covenant as a defense to this damage action without such ruling becoming a State action in violation of:

(a) The due process clause of the Fourteenth Amendment.

(b) The equal protection clause of the Fourteenth Amendment.

(c) The United Nations Charter, a treaty of the United States Government, and

(d) The public policy of the United States Government.

———o———

STATEMENT OF THE CASE

Sergeant John Rice, who was 11/16ths Winnebago Indian, was killed in action with the United Nations Forces in Korea, and arrangements were made for the return of his body to his home in Winnebago, Nebraska. Thereupon his widow, petitioner herein, arranged for burial in the respondent cemetery in Sioux City, Iowa, made a down payment and signed a printed contract on August 12, 1951 for the purchase of cemetery lots containing a clause granting burial privileges "only to members of the Caucasian Race." (R. 10.)

Thereupon the body arrived from Korea, and on August 28, 1951 funeral services were held in the family church at Winnebago, the funeral procession then went to the respondent cemetery where graveside services were held and the family and friends returned to their homes,

leaving the casket over the open grave with the belief that it would be buried (R. 13). Later that same day respondent notified petitioner of its refusal to bury her husband because he was not a member of the Caucasian Race (R. 3 and 4) and that she would have to make other arrangements, unless she would sign an affidavit to the effect that her husband was a member of the Caucasian Race, which she refused to do (R. 4).

Before final arrangements were made for burial, the President of the United States intervened and made an offer—which was accepted—to have the body sent to Arlington National Cemetery in Washington, where final services were held (R. 4).

On December 12, 1951 petitioner filed this damage action in the District Court of Iowa, in and for Woodbury County, claiming damages for humiliation and mental suffering in the sum of $60,000.00 in each of three separate Counts, later twice amended, and the Cemetery, by answer, claimed its conduct was justified by reason of the racial restrictive clause in the contract, to which petitioner responded that such a clause could not be used as a defense. To avoid confusion resulting from the various amendments, a composite petition (R. 2-15) and answer (R. 15-18) were by agreement filed by the parties after respondent had unsuccessfully sought removal to Federal Court (See 102 Fed. Supp. 658), and after the State Court ruled adversely to respondent's motion to dismiss (R. 18). Thereupon both parties made application for adjudication of law points prior to trial and the Court ruled thereon adversely to petitioner (R. 19-24). Following the Court's adjudication of law points, both

parties joined in an application for an interlocutory appeal to the Iowa Supreme Court, which was denied (R. 24-26). Thereupon respondent sought and received a favorable adjudication on the remaining law points (R. 26-29). Thereafter petitioner appealed to the Iowa Supreme Court, which ruled adversely to petitioner's claim that in allowing respondent to defend on the basis of the restrictive covenant the Iowa Court was committing such State action as is prohibited by the due process and equal protection clauses of the Fourteenth Amendment, the public policy of the United States Government, and the United Nations Charter (R. 30-44). Petitioner then sought rehearing on the same grounds (R. 45), which was resisted (R. 46) and denied (R. 48). On February 15, 1954 petitioner sought certiorari in this Court, and it was granted on April 12, 1954 (R. 50).

———o———

SUMMARY OF ARGUMENT

This argument is divided into four parts and a conclusion.

The first part is devoted to showing that the Iowa Court's ruling under all of the circumstances in this case resulted in a violation of the due process clause of the Fourteenth Amendment, and this for the reason that historically in this country common decency in our government requires that no such discrimination as has been practiced here should be allowed to stand without redress. The rights involved are fundamental human rights, and, with the flexibility intended for constitutional interpretation and with legal precedence, there is justification for holding that the due process clause has been violated.

The second phase of the argument is devoted to the equal protection clause of the Fourteenth Amendment and complains that petitioner has been discriminated against and denied legal rights which would have been afforded to persons under similar circumstances who had married a member of the Caucasian Race. Emphasis is placed on the recent decisions of this Court in *Shelley v. Kraemer, Hurd v. Hodge,* and *Barrows v. Jackson* as being ample legal precedent to support a reversal of the Iowa Court, because its ruling has violated the equal protection clause of the Fourteenth Amendment.

The third phase of the argument is devoted to the applicability of the United Nations Charter and the erroneous interpretation and effect placed upon it by the Iowa Court. Reference is made to Article VI of the United States Constitution and to the Preamble and certain Articles of the United Nations Charter. Reference is then made to the applicable decisions requiring broad and liberal interpretation of treaties. This phase of the argument is concluded by a showing that a broad and liberal interpretation of the United Nations Charter requires a finding that its purposes have been violated by the Iowa Court.

The fourth and final phase of the argument is devoted to a showing that the ruling of the Iowa Court results in a violation of public policy of the United States as shown by the Constitution, acts of Congress, a treaty, and pronouncements by this Court.

———o———

ARGUMENT

May it please the Court:

1. The ruling by the Iowa Court is such State action as is prohibited by the due process clause in the Fourteenth Amendment.

State Courts are subject to all of the mandates in the Fourteenth Amendment.

> *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U. S. 672.
>
> *Buchalter v. New York,* 319 U. S. 427.
>
> *Den v. The Hoboken Land & Imp. Co.,* 18 Howard 272, 15 L. Ed. 372.
>
> *Shelley v. Kraemer,* 334 U. S. 1.
>
> *Barrows v. Jackson,* 346 U. S. 249.

The only question is whether the due process clause is applicable to the facts of this case.

This Court has wisely and consistently refused to give a precise definition to the due process clause of the Fourteenth Amendment, indicating instead that what is due process of law depends upon the circumstances and varies with the subject matter and the necessities of the situation.

> *Davidson v. Bd. of Adms. of New Orleans,* 96 U. S. 97.
>
> *Meyer v. Peabody,* 212 U. S. 78.

The question of the applicability of this clause to cases involving racial restrictive covenants has recently been presented to this Court but was not passed upon for the reason that it was not necessary.

Shelley v. Kraemer, 334 U. S. 1.

Hurd v. Hodge, 334 U. S. 24.

Barrows v. Jackson, 346 U. S. 249.

In light of all of the circumstances in this case, petitioner has been denied due process of law under the Fourteenth Amendment for the reason that she has been subjected to the loss of her property rights and mental suffering and humiliation without any redress, contrary to the established and fundamental principles upon which this country was established as announced in its Constitution and in the decisions of this Court.

Throughout the numerous decisions of this Court in a great variety of cases involving the due process clause of the Fourteenth Amendment, various tests are suggested and precedence or lack of it is given little weight since each new case is examined on its own merits. And this Court has held:

> "The 14th Amendment refers to the law of the land of each state, * * * exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions, * * *. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects is not law * * *."
>
> *Hurtado v. People of California,* 110 U. S. 516 at 535.

And in the same case, in discussing the desirability and growth and flexibility, Justice Mathews said:

> "This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law * * *. The Constitution of the United States * * * was made for the undefined and expand-

ing future * * * they must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty and property."

Hurtado v. People of California, supra at 531, 532.

That more is required than procedural fairness was recently reiterated by this Court in *Shelley v. Kraemer,* 334 U. S. 1.

In *Twining v. New Jersey,* 211 U. S. 78 at 106, this Court asked:

"Is it of such a nature that it must be included in the conception of due process? Is it a fundamental principle of liberty and justice which inheres in the very idea of a free government and is the inalienable right of a citizen of such a government? If it is, and if it is of such a nature that pertains to process of law, this court has declared it to be essential to due process of law.

" * * * the basic principle that all people must stand in an equality before the bar of justice in every American court * * * under our constitutional system courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non conforming victims of prejudice and public excitement * * *. No higher duty, no more solemn responsibility rests upon this court than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution of whatever race, creed, or persuasion."

Chambers v. Florida, 309 U. S. 27 at 241.

This Court has held that a statute limiting the right of a property owner to convey his property to a person

of another race was a denial of due process of law (*Buchanan v. Warley,* 245 U. S. 60, 62 L. Ed. 149) for the reason that the discrimination aimed at by the statute violated one of the basic and fundamental concepts of the decency in the American Government. And it has been very recently indicated again by this Court that the equal protection clause and the due process clause are not necessarily interchangeable, even though frequently they are used in that manner, and that school segregation resulted in a violation of the due process clause of the Fifth Amendment (*Bolling v. Sharpe,* 98 L. ed. (Adv. p. 591).

Petitioner does believe most strongly that the ruling of the Iowa Court has deprived her of her property without due process of law and has violated one of the basic concepts of equality and decency which are intended to be covered by the due process clause, particularly when we remember that the Fourteenth Amendment is to be liberally construed (*Byars v. U. S.,* 273 U. S. 28).

2. The ruling by the Iowa Court is such State action as is prohibited by the equal protection clause of the Fourteenth Amendment.

A well-established requirement is that, because the Fourteenth Amendment deals with basic civil and political rights, it is to be liberally construed (*Byars v. U. S.,* 273 U. S. 28), and in making this liberal construction

> "The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action

on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind."

Shelley v. Kraemer, 334 U. S. 1 at 23.

Stated differently, the question of a violation of the Constitution (Fifth Amendment) is to be determined

"not for any narrow, technical reason but for considerations that touch rights so basic to our system that after the Civil War their protection against invasion by the States was safeguarded by the Constitution."

Hurd v. Hodge, 334 U. S. 24.

That discrimination has resulted in this case as the result of the ruling by the Iowa Court cannot be doubted. No contrary logical analysis can be made. The restrictive clause in the printed contract is on its face discriminatory, and the Iowa Court has given its stamp of approval to that discrimination.

Fortunately it is no longer an open question whether a State or Federal Court can directly enforce such a covenant (*Shelley v. Kraemer*, 334 U. S. 1; *Hurd v. Hodge*, 334 U. S. 24). By these rulings this Court gave new strength to the equal protection clause. In both of these cases this Court held that judicial enforcement of a racial discriminatory covenant in a deed is prohibited by the Fourteenth Amendment as pertains to State action and by the Fifth Amendment and public policy as it pertains to Federal action.

In citing these cases this Court found no difficulty in recognizing the very basic rights involved, the obvious

discrimination based upon race or color, and that the decision of the State Courts was such State action as was prohibited by the Fourteenth Amendment, and that the decision by the Federal Court in the *Hurd* case constituted a violation of the applicable provision in the Fifth Amendment as well as public policy.

Following these two landmark cases which brought to an end nearly a century and a half of legal approval of discriminatory covenants in deeds in various State Courts, those most directly affected by such rulings attempted to restrict the effect of the Shelley and Hurd rulings by such attempts as seeking damages for violation of the racial restrictive covenant (*Phillips v. Naff*, 52 N. W. 2d 158 (Mich.)). But these attempts to accomplish indirectly what this Court so wisely held could not be accomplished directly were finally resolved by this Court in *Barrows v. Jackson*, 346 U. S. 249. This Court there held that, if a State Court were to allow recovery of damages for violation of the restrictive covenant, it would be such State action as is prohibited by the Fourteenth Amendment, and further stated that the allowance of damages would be:

> "solely for the purpose of giving vitality to the restrictive covenant; that is to say to punish respondent for not continuing to discriminate against non-Caucasians * * *."

The very heart of the decision in the *Barrows* case was that litigants through State Courts could not accomplish indirectly what *Shelley v. Kraemer* held could not be accomplished directly.

Respondent cemetery in this case is attempting to protect itself by using the restrictive covenant as a shield

in this damage action. The Iowa Court by its ruling has made it possible for the cemetery to use the covenant as a defense. The Iowa Court has therefore by its ruling given vitality to the restrictive covenant and is punishing petitioner for her failure to abide by it.

Respondent and the Iowa Court admit that the covenant could not be specifically enforced, but the Iowa Court claims that, since it is neutral (R. 36), it is not lending support to the restrictive covenant. Clearly the Iowa Court has not been neutral and, without the ruling of the Iowa Court, the cemetery would have no legal basis on which to defend its conduct.

Petitioner states again that she is not claiming that contracts with racial restrictive covenants are illegal or unconstitutional in and of themselves, nor is she claiming that, so long as the parties to such contracts voluntarily adhere to their terms, any wrong has been committed. Petitioner's case will not result in the disappearance of cemeteries intended only for members of a particular religious belief or other private cemeteries devoted to particular groups of people.[1]

Just as in the *Shelley* case, we are no longer concerned with voluntary adherence to the terms of a private contract because here as there one of the parties, petitioner, refuses to adhere to it, and the question of that adherence or lack of it is before the Court. The result is that it is no longer just a private dispute because the Court

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1 Neither is petitioner suggesting that the cemetery was compelled to sell the lot to her as was the situation in **Dorsey v. Stuyvesant Town Corp.**, 299 N. Y. 512, 87 N. E. 2d 541, 14 A. L. R. 2d 133; certiorari denied 399 U. S. 981.

has been called upon to resolve it, and the Iowa Court cannot either directly under the *Shelley* case or indirectly under the *Barrows* case give its stamp of approval to the covenant, but that is just what the Iowa Court in this case has done.

If petitioner's deceased husband had been a so-called Caucasian, the cemetery's conduct would have been subject to the recovery of damages, but, since petitioner's husband was a part American Indian, the Iowa Court has held that no recovery can be had and that petitioner must bear her humiliation and grief without redress. This is the clearest type of discrimination and can be justified only by use of the restrictive covenant, and the Iowa Court has held that such justification may be used. The Iowa Court has therefore itself violated the equal protection clause in the Fourteenth Amendment.[2]

Interestingly, a Federal District Court in the State of California many years ago correctly analyzed the problem when it said:

> "It would be a very narrow construction of the constitutional amendment in question and of the decisions based upon it, and a very restricted application of the broad principles upon which both the amendment and the decisions proceed, to hold that, while state and municipal legislatures are forbidden

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2 It is interesting to observe that in 1948 the Texas Civil Appeals Court, in refusing to give judicial sanction to a restrictive covenant forbidding the sale of land to persons of Mexican descent, reasoned that as a result of the litigation it was no longer a question of the voluntary choice of the parties to abide by the covenant but had now become the choice of the State of Texas.

Clifton v. Puente, 218 S. W. 2d 272 (Tex. Civ. App. 1948).

to discriminate against the Chinese in their legislation, a citizen of the state may lawfully do so by contract, which the courts may enforce. Such a view is, I think, entirely inadmissible. Any result inhibited by the constitution can no more be accomplished by contract of individual citizens than by legislation, and the court should no more enforce the one than the other. This would seem to be very clear."

Gandolfo v. Hartman, 49 Fed. 181.

3. The ruling by the Iowa Court is a violation of the United Nations Charter, a treaty of the United States Government.

The Iowa Court quite summarily dismisses this contention by stating that the treaty has no application to the private conduct of individual citizens of the United States (R. 38) and by stating that the treaty does not have the effect of superseding State laws relating to contracts (R. 39).

Article VI of the United States Constitution specifically states that treaties under the authority of the United States "shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding * * *."

Here then is another constitutional mandate which the Iowa Court has refused to obey, and, if there be any question about it, we will refer to some of the decisions in this Court construing treaties and the effect of Article VI hereinabove referred to.

One of the leading cases for interpretation and effect of treaties is *Missouri v. Holland,* 251 U. S. 415, wherein Mr. Justice Holmes, referring to the Migratory Bird

Treaty between the United States and Canada after a Congressional attempt at control was declared unconstitutional, said in part:

> "Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. * * * We do not mean to imply that there are no qualifications to the treaty-making power; but that must be ascertained in a different way. * * * and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found. * * * *No doubt the great body of private relations usually falls within the control of the state, but a treaty may override its power.*" (Emphasis ours.)

It has been variously said that treaties are to be taken in their ordinary meanings as understood in the public law of nations and not any artificial or special sense impressed upon them by local law; *Santovincenzo v. Egan,* 284 U.S. 30; *Geoffrey v. Riggs,* 133 U.S. 58; *United States v. D'Auterive,* 10 Howard 609, 13 Law Ed. 560; treaties should be so construed as to uphold the sanctity of public faith, *Ward v. Race Horse,* 163 U.S. 504; words with plain meaning cannot be rejected as surplusage in treaties, *Foster v. Neilson,* 7 Law Ed. 415; and in construing a treaty its history should be consulted, *Cook v. United States,* 288 U.S. 102.

Treaties are to be construed in a broad and liberal spirit and, where it fairly admits of two constructions, that one is preferred which enlarges rather than limits rights which may be claimed under such treaty.

Bacardi Corp. v. Domenach, 311 U.S. 150.

Jordan v. Tashiro, 278 U. S. 123.

Asakura v. Seattle, 265 U. S. 332.

Shanks v. DuPont, 7 Law Ed. 666.

Geoffrey v. Riggs, 133 U. S. 58.

Treaties are to be construed more liberally than private agreements, and it is permissible to look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.

Choctaw Indians v. United States, 318 U. S. 423.

Because treaties are solemn obligations entered into between nations for the interest of civilization, and as their main object is to avoid war and secure a lasting peace and promote a friendly feeling, they should be interpreted in that broad and liberal spirit which is calculated to make for the existence of perpetual amity.

Tucker v. Alexandroff, 183 U. S. 424.

There can be no question then but that in approaching this phase of our argument the United Nations Charter and its effect and applicability must be viewed with a broad and liberal rather than a confining interpretation. Here the question cannot be whether a treaty can supersede local State laws pertaining to the conduct of private individuals, but rather whether the United Nations Charter was intended to serve as a mandate to the Iowa Court that it could not allow the cemetery to defend this action on the basis of the restrictive covenant in question.

We come, therefore, to the problem of determining the intended effect of the United Nations Charter.

The Preamble to the United Nations Charter, as set forth in full in the Appendix to this argument, states in part as follows:

> "We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom, and for these ends to practice tolerance and live together in peace with one another as good neighbors, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples, have resolved to combine our efforts to accomplish these aims. * * * "

Chapter 1, Article 1, Subparagraphs (2) and (3) of the Charter state, in part, as follows:

> "The Purposes of the United Nations are: * * *
>
> "2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
>
> "3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; * * * "

Finally Chapter IX, Articles 55 and 56 of the Charter state, in part, as follows:

"Article 55

"With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of people, the United Nations shall promote; * * *

"c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

"Article 56

"All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

This Charter, devised and entered into by the greatest minds of the world at the conclusion of World War II, most clearly indicates not only the desire but the necessity that human freedoms be protected without respect to race or creed if international strife such as was suffered in World War II is to be avoided. This Charter, with the high and noble purpose of avoiding war and improving the lot of mankind generally, must be given the broadest and most liberal interpretation possible under the cases hereinbefore cited.

It requires no stretch of the imagination but only a plain reading of the Charter to realize that it was intended to prevent just such discrimination and lack of equality as is apparent in this case. Article 56 above quoted spe-

cifically states that each member nation will take joint and separate action for the achievement of the broad protection of human rights and freedoms without discrimination. It is therefore incumbent upon the United States Government, through its appropriate agencies, to make certain that these fundamental principles are not violated within the boundaries of the United States of America. More explicitly, Article VI of the United States Constitution states most thoroughly that the State Courts are bound by the great purposes of this United Nations Charter, irrespective of anything in the Constitution or laws of that State to the contrary.

It is therefore apparent that the Iowa Court, bound as it was by this solemn treaty of the United States Government, is in error by trying to restrict or limit the meaning of the Charter and by agreeing with the Michigan Court that the Charter was merely indicative of a desirable social trend (R. 39). It cannot possibly be said that the Iowa Court, by the ruling herein complained of, is giving even lip service to the Preamble or Article 55(c) of the Charter, even though it is bound under Article 56 to affirmatively promote the purposes set forth in Article 55.

This is not a novel suggestion and has previously been discussed in such cases as *Perez v. Lippold,* 32 Cal. 2d 711; *Namba v. McCourt,* 153 Ore. 579, 204 Pac. 2d 569; *Curran v. City of New York,* 77 N. Y. S. 2d 206; *Fujii v. California,* 242 Pac. 2d 617; *Sipes v. McGhee,* 316 Mich. 614, 25 N. W. 2d 638. See also 34 Iowa Law Review 1.

More important, this question has been discussed by past and present members of this Court in the case of

Oyama v. California, 332 U.S. 632, where at page 673 Mr. Justice Murphy and Mr. Justice Rutledge in a concurring opinion stated:

> "Moreover, this nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion. The Alien Land Law stands as a barrier to the fulfillment of that national pledge. Its inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned."

And at pages 649, 650 Mr. Justice Black and Mr. Justice Douglas in a concurring opinion state:

> "There are additional reasons now why that law stands as an obstacle to the free accomplishment of our policy in the international field. One of these reasons is that we have recently pledged ourselves to cooperate with the United Nations to 'promote * * * universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.' How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?"

There as here the same question can be asked. How can the United States be faithful to its pledge in solemn treaty with other countries if its Courts, or the Courts of the State of Iowa, given the opportunity presented in this case, do not refuse, both directly and indirectly, to allow respondent to use the restrictive covenant as a shield in this action for damages when the only possible justifica-

tion for the cemetery's conduct is bottomed on racial discrimination?

4. The ruling by the Iowa Court erroneously interprets the public policy of the United States Government.

The Iowa Court has held that there is some doubt as to whether the public policy of the United States is violated by its ruling in this case (R. 40). We fail to understand that doubt because the Iowa Court, citing some of its own cases, indicates that to determine policy we must look to the Constitution, statutes, and judicial decisions (R. 40). That is precisely what we have consistently urged.

The Constitution of the United States clearly prohibits any action by the States which will result in the loss of life, liberty, or property without due process of law, or which will result in denying any person within its jurisdiction equal protection of the laws, all as is shown by the Fourteenth Amendment to the Constitution. The United States Congress has enacted what is known as the Civil Rights Act, 8 U. S. C. A. 42, 2 F. C. A. Title 8, Sec. 42, which is aimed at preventing racial discrimination. Thus we have the Constitution itself and an act of Congress to indicate the public policy of the United States Government, and, if that is not enough to satisfy the Iowa Court, then the United Nations Charter, which is a treaty requiring the member nations to protect its citizens against racial discrimination, should clearly indicate the public policy of the United States.

If there is still some doubt as to what this policy is, the United States Supreme Court has several times announced it:

> "But even in the absence of the statute, there are other considerations which would indicate that enforcement of restrictive covenants in these cases is judicial action contrary to the public policy of the United States * * *. Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power."
>
> *Hurd v. Hodge,* 334 U. S. 24 at 34 and 35.
>
> See also *Shelley v. Kraemer,* 334 U. S. 1.
>
> *Barrows v. Jackson,* 346 U. S. 249.

We therefore have the Constitution of the United States, a treaty of the United States, an act of Congress, and decisions of the United States Supreme Court indicating that the public policy of the United States Government is opposed to such conduct as is herein complained of. In fact, the history of the United States from its organization up to the present time is replete with indications, which have been heard around the world, that any form of discrimination based upon race or color is prohibited.

There cannot be the slightest doubt but that the public policy of the United States has been violated here and the Iowa Court has, by its ruling, offended that policy. This Court, having assumed jurisdiction of this case, should now correct that ruling and re-establish the public policy of the United States Government.

———o———

CONCLUSION

Petitioner has presented four reasons why the ruling of the Iowa Court should be reversed, any one of which standing alone would be sufficient cause for reversal.

We are dealing here with fundamental rights granted to petitioner and others not because of some statute but because individual liberties and common decency demand it. This is basic in the history of the common law and in the history of this Court and has been incorporated into the Constitution of the United States.

A cruel and humiliating thing has been done to petitioner by the respondent cemetery, and yet the Iowa Court has told petitioner that, even though she has been wronged, she has no redress and she must suffer the consequences of having married an American Indian rather than a so-called Caucasian. This is a fundamental issue involving fundamental human rights, and, since no one could even suggest that the cemetery could have committed the same acts without redress if petitioner's husband had been a so-called Caucasian, it is apparent that discrimination because of her interracial marriage is the only logical result of the Iowa Court's ruling. This being so fundamental a right and being so firmly bottomed on discrimination, this Court could well hold with reasoning similar to that found in *Buchanan v. Warley* that due process of law has been denied to the petitioner.

The petitioner has more than lack of due process to complain of. Again because of the very nature of the case and the result of the Iowa Court's ruling, discrimination is involved, and this discrimination is based upon the fact

that Sergeant Rice was part American Indian rather than a so-called Caucasian. This is racial discrimination in its simplest form, and such racial discrimination is clearly prohibited by the equal protection clause of the Fourteenth Amendment. To hold that this terrible thing could be done to petitioner without redress because she married a non-Caucasian, and for no other reason, is the most violent sort of discrimination by the Iowa Court and is therefore such discrimination by the State of Iowa as is prohibited by the equal protection clause.

As said by the Texas Court in *Clifton v. Puente*, it was no longer a question of the voluntary choice of the parties to abide by the discriminatory clause but had now become the choice of the State of Texas. Obviously the parties in this case have not voluntarily adhered to the restrictive covenant and, the matter being in Court, it was the Iowa Court's choice to abide or not abide by the restrictive covenant, and the Iowa Court chose to abide by it, thereby violating the equal protection clause of the Fourteenth Amendment.

Shelley v. Kraemer said that a State Court cannot specifically enforce such a covenant in a deed, and *Hurd v. Hodge* said that the public policy of the United States would be violated if a Federal Court enforced such a covenant. *Barrows v. Jackson* said that a State Court could not allow recovery of damages for refusal to abide by the restrictive covenant on the sound reasoning that what cannot be done directly cannot be done indirectly, and the allowance of recovery of damages would result in giving vitality to the objectionable covenant in question. It is inescapable that the Iowa Court has given vitality to this

restrictive covenant by allowing the cemetery to defend on the basis of it, and such ruling by the Iowa Court violates the equal protection clause of the Fourteenth Amendment.

If more is needed, the United Nations Charter presents but another reason why the Iowa Court should be reversed. Under Article VI of the Constitution, the treaty supersedes State laws and is binding on the Iowa Courts, and under the many decisions in this Court, the treaty is to be given a broad and liberal interpretation.

A broad and liberal interpretation of the United Nations Charter compels the conclusion that the Iowa Court was bound to discredit any attempt at racial discrimination, and in this general type of case members of this Court have agreed.

Finally, if there is still any doubt about the matter, the first three phases of our argument can be combined to give strength to the proposition that the ruling of the Iowa Court is contrary to the public policy of the United States.

There is nothing vague or indefinite or nebulous about the policy involved. It has been announced in the Constitution, it has been announced in an act of Congress, it has been announced by a treaty, and it has been announced by the decisios of this Court, not once but many times, that discrimination because of race, creed, or color is contrary to the public policy of the United States.

Petitioner has been discriminated against, and the only possible justification which either the respondent or the Iowa Court has been able to muster is the restrictive

covenant in the contract. This restrictive covenant discriminates against those who are not members of the so-called Caucasian Race and does nothing else. That is its sole function. A Court which enforces it or allows it to be used as a basis for a damage suit, or allows it to be used as a defense against a damage suit, is giving vitality to that covenant. The Iowa Court has given it vitality and should be reversed.

The decision of the Iowa Supreme Court should be reversed and the case remanded to that court with instructions to take such appropriate action as is needed to conform to this decision with costs in the Supreme Court of Iowa and in this court taxed to the respondent and for such other relief as this court may deem proper.

Respectfully submitted,

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APPENDIX

The Preamble to the United Nations Charter recites, in part, as follows:

> "We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom, and for these ends to practice tolerance and live together in peace with one another as good neighbors, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples, have resolved to combine our efforts to accomplish these aims. * * * *"

Chapter 1, Article 1, Subparagraphs (2) and (3) of the United Nations Charter read, in part, as follows:

> "The Purposes of the United Nations are: * * *
>
> "2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
>
> "3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for

fundamental freedoms for all without distinction as to race, sex, language, or religion; * * * "

Chapter IX, Articles 55 and 56 of the Charter, reads in part as follows:

"Article 55

"With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of people, the United Nations shall promote; * * *

"c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

"Article 56

"All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

Civil Rights Act, 42 U. S. C. A., Sec. 1981:

"Equal rights under the law. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

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Supreme Court of the United States

October Term, 1953

No. 28

EVELYN RICE,

Petitioner,

vs.

SIOUX CITY MEMORIAL PARK CEMETERY, INCORPORATED, A Corporation; F. K. LYTLE, and J. M. GUNNELL

Respondent.

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SIOUX CITY MEMORIAL PARK CEMETERY, INCORPORATED, A Corporation; F. K. LYTLE, and J. M. GUNNELL

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Iowa herein sought to be reviewed by Petitioner is entitled: "In the Supreme Court of Iowa, No. 102,48304, Evelyn Rice, Appellant, vs. Sioux City Memorial Park Cemetery, Incorporated, a corporation; F. K. Lytle and J. M. Gunnell, Appellees," filed September 22, 1953, rehearing denied November 20, 1953, printed in 60 N. W. 2d 110; all justices concurring.

JURISDICTION

Final judgment of the Supreme Court of Iowa, overruling petition for rehearing was entered on November 20, 1953. The petition for Writ of Certiorari in the Supreme Court of the United States was served on Respondents February 17, 1954. The jurisdiction of the Supreme Court of the United States is invoked under Title 28 U. S. C. § 1257 (3).

———o———

QUESTION PRESENTED

The question presented by Petitioner is:

Whether a private cemetery corporation, organized for profit, may refuse "right of sepulture" to a non-Caucasian in a case where plaintiff has voluntarily entered into a contract providing "Burial privileges accrue only to members of the Caucasian race."

Plaintiff below entered into a contract (R. 13-15) which provided in part:

> "* * * Party of the second part (plaintiff) agrees to purchase from the said party of the second part (defendant cemetery); * * * right of sepulture. * * * Burial privileges accrue only to members of the Caucasian race * * *."

Plaintiff requested defendant to bury her deceased husband, an American Indian, which request was refused. Plaintiff then brought suit against defendant for $180,000.00 damages for breach of contract and tort; claiming that the racial restriction was void. The court below ruled as a matter of law that the refusal of the court to grant plaintiff damages did not constitute "State

action," contrary to the *Fourteenth Amendment* to the United States Constitution, the *United Nations Charter*, or the public policy of the United States government.

—o—

CONSTITUTION AND STATUTES INVOKED

The applicable constitutional provisions and provisions of the United Nations Charter are referred to in petitioner's brief and are not repeated here.

—o—

STATEMENT OF CASE

Petitioner's brief adequately states the case here involved, except that petitioner has included several immaterial and prejudicial statements taken from the pleadings and which were in no way involved in the adjudication of law points by the lower court.

The lower court ruled on questions of law under the provisions of Rule 105, *Iowa Rules of Civil Procedure*, that the racial restrictive clause relative to right of sepulture was not "void" and could be relied upon by defendant as a defense in an action for damages. The Supreme Court of Iowa affirmed, holding that no "State action," violative of plaintiff's constitutional or other rights was involved (R. 63-77).

It is to be noted that plaintiff made no claim of fraud or mistake and did not seek reformation of the contract.

—o—

PROPOSITIONS RELIED UPON BY RESPONDENT

The Petition for Writ of Certiorari presents no question not heretofore determined by this Court, or decided by the Court below in a way probably not in accord with applicable decision of this Court. (Rule 38, 5 (a).)

(1) The Fourteenth Amendment forbids only state or official action and erects no bar against racial discrimination by private parties.

(2) Nothing in the United Nations Charter restricts racial restrictive covenants between private citizens of the United States.

(3) There is no "public policy" of the United States forbidding racial restrictive covenants "voluntarily entered into."

———o———

ARGUMENT

What is involved here is the novel theory advanced by Petitioner that a private party may enter into a contract containing a racial restriction and then recover damages from the other party to the contract because such other party refuses to agree to a violation of the contract.

Petitioner has conceded at all stages of this litigation and concedes in her brief in support of this Petition (Petitioner's brief, p. 20) that defendant cemetery had a perfect right to refuse to grant a right of sepulture to her, for racial reasons or for no reason at all. She admits that respondent was under no legal obligation to grant burial privileges to an Indian, and its refusal to do so would give her no right of action. She takes the position, however, that she may enter into a contract with the

cemetery by which she definitely agrees that the right of sepulture for which she contracts does not extend to the privilege of burying an Indian, and that she may then demand a judgment in a court of law for damages because the cemetery refused to bury an Indian contrary to her express agreement.

Petitioner recognizes that this Court has held many years ago in the *Civil Rights Cases,* 109 U. S. 3, 27 L. Ed. 835, that the Fourteenth Amendment to the United States Constitution refers only to "state action" and cannot be extended to acts of purely private parties. She recognizes further that this Court denied certiorari in the case of *Dorsey v. Stuyvesant Town Corporation* (1949), 209 N. Y. 512, 87 N. E. 2d 541, 14 A. L. R. 2d 133, 339 U. S. 981, 70 S. Ct. 1019, Cert. Den. 94 L. Ed. 1385, wherein it was held that a private corporation (even though it had many of the attributes of public authority, emphasized in the dissenting opinion) might refuse with impunity to lease property, on purely racial grounds.

Petitioner cites and relies on *Shelley v. Kraemer* (1948), 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, 3 A. L. R. 2d 441, wherein this Court said:

> "That Amendment (Fourteenth) erects no shield against merely private conduct, however discriminatory or wrongful.
>
> "We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there had been no action by the State and the provisions of the Amendment have not been violated."

The Petitioner by curious and perverted logic seizes upon the language, "voluntary adherence," and states:

> "If the petitioner had voluntarily acquiesced in the conduct of the cemetery, or if the petitioner and the cemetery voluntarily acquiesced in and complied with the terms of the restrictive covenant, no one would complain and that would not be violating a law or a treaty but here there was no voluntary acquiescence and, because one of the parties has refused to comply with the racially restrictive covenants on a voluntary basis, and the matter has been presented to court and the question is whether the Iowa court has violated the United Nations charter." (Petitioner's Brief, p. 12.)

Petitioner argues that since this Court has held in the *Shelley v. Kraemer* case, supra, and in *McGhee v. Sipes,* (1948), 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1187, 3 A. L. R. 2d 441; *Hurd v. Hodge* (1948), 334 U. S. 24, 68 S. Ct. 847, 92 L. Ed. 1187, and in *Barrows v. Jackson,* (1953), 346 U. S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586, that to *enforce* a racial restrictive covenant by the judicial arm of the State constitutes State action, that it is also State action for the State court to *do nothing* where a party to such a covenant attempts to repudiate it and recover damages from the other party.

Petitioner argues that since a restrictive covenant can not be used as a sword, it, therefore, cannot be used as a shield (Petitioner's Brief, p. 10). No decision of this Court has ever gone beyond saying that State action to *enforce* a restrictive covenant, either by injunction or damages, is forbidden by the Fourteenth Amendment. In the case at bar no State action is involved. Respondent is not defending a breach of covenant. Peti-

tioner, who desires to breach the contract, asks the State court to punish Respondent because it lived up to the terms of an agreement which Petitioner fairly and voluntarily made.

It should be pointed out that "right of sepulture" has a very ancient history and has always received special treatment in the law (See the *Law of Cadavers and Burial and Burial Places,* Percival E. Jackson Second Ed., Prentice-Hall, Inc., 1950. See also *Brnilovich v. St. George Independent Serbian Orthodox Church* (Pa. 1937), 191 A. 655, 110 A. L. R. 384, and Annotation "Right to Exclude from Privilege of Burial in Cemetery," 110 A. L. R. 388, 393).

The Respondent submits that Petitioner has not been punished by the decisions of the Iowa Supreme and District Courts because she married a non-Caucasian. Her marriage has nothing to do with this matter. She agreed in her contract not to bury a non-Caucasian. Had she attempted to have buried any non-relative who was not of the Caucasian race, she would equally have been met with the terms of her contract. Again, Respondent says that a marriage to a non-Caucasian had nothing to do with this case, and Respondent submits such an allusion as has been made is unfair and a reflection against the District Court and Supreme Court of Iowa, and is entirely unwarranted.

Is the decision of the Supreme Court of Iowa violative of the United Nations Charter? The question of the possible applicability of the *United Nations Charter* as a Treaty is very fully and adequately covered by decision of the Supreme Court of Iowa found at Division II of the decision (R. 71-73). The argument of Petitioner

as to this phase of the case is completely answered by the decision of the Michigan Supreme Court in *Sipes v. McGhee*, 316 Mich. 614, 25 N. W. 2d 638, 644, and of the Supreme Court of California in *Fujii v. Cal.*, 242 Pac. 2d 617, 622, 38 Cal. 2d 718, reviewing the decision in Cal. App. 217 Pac. 2d 481, and the Supreme Court of Iowa in the instant case. While *Sipes v. McGhee* was reversed by this Court on constitutional grounds, there was no criticism of the conclusions of the Michigan Court as to the applicability of the *United Nations Charter*. The language used by the United Nations Charter clearly indicates that the parts quoted by Petitioner were not self executing. "On those parts of the charter that were to be self executing, they were set forth in language that was clear and definite that such intention was manifest." (*Fujii v. Cal.*, supra.)

Likewise on the question of "public policy," this was also fully discussed by the Iowa Supreme Court (R. 70, 71-73). That Court said:

> "Our sympathy must not be allowed to carry us to the aid of either party in circumstances of this nature unless the restriction is clearly one against public policy. * * *
>
> "It is well to mention here that the proper state authority, the 1953 Iowa Legislature, in Chap. 84, Acts of the 55th G. A. Sec. 1, and Sec. 8, did expand the Iowa civil rights law to cover just such incidents as arose in this case, *but* it is also worthy of note that by exceptions this legislation did not abridge desirable individual rights of restriction in church and fraternal private burial places. Such proper discretion could not occur under plaintiff's urged expansion of constitutional construction. * * *

"* * * Having named such things lodging houses, restaurants and places of amusements, the defendants were not acting in violation of Iowa law and the expression 'expressio unius est exclusio alterius' is applicable here." (R. 70-71)

—o—

CONCLUSION

In conclusion it is submitted that the decision of the Supreme Court of Iowa, which is sought to be reviewed here, decides no question of substance not heretofore determined by this Court, nor has it decided any question not probably in accord with applicable decisions of this Court. It is conceded without question that Respondent cemetery would have violated no law or constitutional right of plaintiff by refusing to grant to her right of sepulture for any person not a member of the Caucasian race. It could refuse for any reason, a bad reason, or for no reason at all. The cemetery had consistently in the past restricted burial upon its property to members of the Caucasian race (R. 66). There is no evidence or claim that plaintiff, a white woman, at any time prior to the signing of the written contract revealed to the cemetery company that she had any intention of offering for burial the body of any person other than a Caucasian.

The contract in question between the parties was not a sale of land but an agreement to grant "right of sepulture" only to a member of the Caucasian race; the agreement between the parties provided for burial of a Caucasian and denial of burial to all others.

For a State court to have held that Petitioner had stated a cause of action against Respondent in damages

under the circumstances, would have been tantamount to holding that the parties had no right voluntarily to enter into the contract in question. No constitution, law or judicial decision supports such a holding.

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Supreme Court of the United States

October Term, 1954

No. 28

EVELYN RICE,

Petitioner,

vs.

SIOUX CITY MEMORIAL PARK CEMETERY, INCORPORATED, A Corporation; F. K. LYTLE, and J. M. GUNNELL

Respondent.

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

OPINION DELIVERED IN COURTS BELOW

The statement in Petitioner's Brief under this heading is correct, except that the opinion of the Supreme Court of Iowa reported in 60 N. W. 2d 110 is the only decision herein involved. The decision in the United States District Court for the Northern District of Iowa, Western Division, reported in 102 Fed. Supp. 658 is in no way involved.

STATEMENT OF GROUNDS

Statement contained in Petitioner's Brief under this heading is correct.

CONSTITUTION AND TREATY PROVISIONS INVOLVED

Statement contained in Petitioner's Brief under this heading is correct.

———o———

QUESTIONS PRESENTED FOP REVIEW

Statement contained in Petitioner's Brief under this heading is correct, except that we would restate the question in slightly different form as follows:

> The review presents the single question whether the decisions of the Courts of Iowa, the Trial Court and the Supreme Court, constituted "state action" in contravention of the Fourteenth Amendment to the United States Constitution; any provision of the United Nations Charter; or, any applicable Federal Public Policy.

———o———

STATEMENT OF THE CASE

Petitioner's statement of the case is accurate with the following modifications:

The contract in question was not strictly one for the purchase of cemetery lots, but was one for

> "Right of sepulture * * * for burial purposes only * * * and burial privileges accrue only to members of the Caucasian Race." (R. 10.)

There is nothing in Petitioner's Petition filed in the court below claiming any fraud or asking reformation of the contract. (See Petition R. 2-9.)

The case was not tried on the merits, but was heard on appeal in the Supreme Court of Iowa upon the ruling of the Trial Court, upon points of law, and particularly the Trial Court's ruling:

(a) That while the burial contract between the parties is unenforceable by Court action because of the racial restriction, it is "not void"; (R. 22)

(b) That no "state action" contrary to the Fourteenth Amendment or the United Nations Charter is involved, in permitting defendant to defend against an action for damages. (R. 22-24.)

———o———

SUMMARY OF ARGUMENT

Respondent's argument is presented under three (3) heads:

1. No "state action" is involved contrary to the Fourteenth Amendment (either the "due process" or the "equal protection" clauses) by the ruling of the Iowa Court.

2. The United Nations Charter does not prevent "racial discrimination" by private citizens of States.

3. There is no Federal Public Policy forbidding "racial discrimination" by private citizens of States.

———o———

ARGUMENT

1.

No State Action Is Involved

Petitioner in her argument has separately presented the "due process" clause, and the "equal protection" clause of the Fourteenth Amendment, although conceding that there appears to be no authority directly in point to the effect that racial discrimination by private citizens of a State has ever been held to violate "due process." Even in the case of *Hurd v. Hodge* (334 U. S. 24; 68 S. Ct. 847; 92 L. Ed. 1187), which involved not citizens of a State, but citizens of the District of Columbia, this Court found it unnecessary to rule upon that constitutional issue. The HURD case was decided upon the Civil Rights Act of 1886 (8 U. S. C. A., §§ 41-42, 2 F. C. A., Title 8, §§ 41, 42), which was held to be unconstitutional as applied to citizens of States in the CIVIL RIGHTS CASES (1883, 109 U. S. 3; 3 S. Ct. 18; 27 L. Ed. 835), but was held to be applicable to citizens of the District of Columbia by the HURD decision.

In any event the Fourteenth Amendment forbids denial of *due process* or *equal protection* by the *State* and not by private individuals. The Fourteenth Amendment is, of course, not applicable to the District of Columbia, although the Fifth Amendment is. (*Hurd v. Hodge*, supra.)

That racial discrimination by citizens of states, either private or corporate, is not violative of the equal protection clause, has been too often held to merit argument. In the series of cases: *Shelley v. Kraemer*, *McGee v. Sipes* (1948, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1187,

3 A. L. R. 2d 441), etc., this Court made it perfectly clear that the only question open for decision was whether *enforcement* of a racial discrimination by *any official* action violated any rights of the citizen. Those cases held that a *judicial injunction* constituted such state action. In the later decision of *Barrows v. Jackson* (1953, 346 U. S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586), this Court answered the question left open in the *Shelley* case and held that the *granting of judgment for damages* against one who breached a racial covenant constituted effective enforcement of a racial discrimination and was, therefore, state action contrary to the Fourteenth Amendment.

But, in the *Shelley* case, this Court made it abundantly clear that merely private action violated no guarantees against racial discrimination.

> "Since the decision of this Court in the civil rights cases, 109 U. S. 3; 27 L. Ed. 835, 3 S. Ct. 18 (1883), the principle has been firmly imbedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may be fairly said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." (*Shelley v. Kraemer*, supra.)

Respondent's case here rest upon the ingenious but unsound argument that failure to punish one who enters into an agreement containing a racial restriction *encourages* such discrimination. Such "failure to punish" (so the argument goes) is action by the State.

As pointed out by the Supreme Court of Iowa in the decision here under review, the Iowa Civil Rights Acts (Chapter 735 Code of Iowa 1950) forbids racial discrim-

ination by individuals as to certain activities; but until after the trial of this case, Iowa "had not seen fit to declare such private cemeteries within the civil right laws of this State." (R. 38.) The Iowa Supreme Court points out, however, that following the decision by the Trial Court in this case, the Iowa Legislature did (Chapter 84—55th G. A., § 1, § 8, 1953) expand the Civil Right Law "to cover just such incidents as arose in this case." The Iowa Court states further:

> " * * * but it is also worthy of note that by exceptions this legislation did not abridge desirable individual rights of restriction in church and fraternal private burial places. *Such proper discretion could not occur under plaintiff's urged expansion of constitutional construction.*" (Emphasis added, R. 37-38.)

If Petitioner's theory is valid, there could be no such thing as a burial place restricted to religious and racial groups. Although Petitioner admits (Brief p. 14, n. 1) that under the doctrine of *Dorsey v. Stuyvesant Town Corporation* (299 N. Y. 512, 87 N. E. 2d 541, 14 A. L. R. 2d 133, Cert. Den. 399 U. S. 981, 70 S. Ct 1019, 94 L. Ed. 1385), a private concern cannot be held liable in any manner for *refusing* to deal, or to enter into a contract for racial or other reasons. Petitioner nevertheless contends that if such private concern *does* enter into a contract *limited* to certain purposes, it should be made to respond in damages for refusal to perform a different contract *unlimited* as to such purposes.

Petitioner overlooks the fact that her contract was that she would bury only a Caucasian. The Respondent was not interested in whom she married. Neither are the Courts.

Suppose the Petitioner had been an Indian, but her husband had been a Caucasian. In such event if she had offered his body for burial, there is no question the Respondent would have had to bury her husband or respond in damages. It is, therefore, clear that the complaint of Petitioner that she has been discriminated against because of her marriage is obviously unfair and untrue. She has failed in the District and Supreme Court of Iowa not because of her *marriage* but because of her *contract*, voluntarily made. Petitioner offered for burial a non-Caucasian, and seeks damages of $180,000.00 on account of Respondent's refusal to perform a wholly different contract.

Petitioner states (Petitioner's Brief, p. 14):

> "Petitioner's case will not result in the disappearance of cemeteries intended only for members of a particular religious belief or of other private cemeteries devoted to particular groups of people * * * neither is Petitioner suggesting that the cemetery was compelled to sell a lot to her as was the situation in *Dorsey v. Stuyvesant Town Corporation* * * * "

Despite Petitioner's disclaimer, this is exactly what she is contending. Suppose a private cemetery "intended only for the members of a particular religious belief, or other private cemeteries devoted to particular groups of people," contracts for the burial of the body of a Catholic or Jewish communicant in good standing, and the other party to the contract offers for burial one not so qualified; according to Petitioner's contention in this case, the refusal of a Court to grant damages against the cemetery for refusal of burial contrary to the terms

of such contract would constitute "state action" in violation of the Fourteenth Amendment, the United Nations Charter, etc.

It is an obvious contradiction in terms if a private person or corporation has the *undoubted right* to refuse to contract with a person for religious, racial, or any other reason, and has the right to deal, if at all, only with persons of a particular race or religion, but can be punished for so doing or for so limiting his or its contracts. We are thus forced into the absurd position of saying, "You have a perfect right to do the act but you will be punished or be liable for damages if you do it."

Petitioner admits (Brief, p. 14) that Respondent has an undoubted right to refuse to deal with Petitioner at all, for any reason or no reason, but contends that if the parties did enter into a contract of a particular kind, damages should be awarded for not carrying out an entirely different contract. The right not to sell or to deal at all would appear to carry with it the right to deal only on the seller's terms, so long as such terms are neither illegal nor void as a matter of law.

In connection with the *Dorsey v. Stuyvesant Town Corporation*, supra, case, it is recalled that this Court denied Certiorari (339 U. S. 982; 94 L. Ed. 1385). Mr. Justice Jackson was of the opinion that certiorari should be granted. An interesting history of the Stuyvesant Town Corporation property that was involved appears in an article in the August 1954 American Bar Association Journal, Volume 40, No. 8, at p. 679. The negroes who had been denied the right to become tenants of the property on racial grounds by the highest Court in the State

of New York (*Dorsey v. Stuyvesant Town Corp.*, 299 N. Y. 512; 87 N. E. 2d 541; 14 A. L. R. 2d 133) managed to get into the possession of one of the apartments "as guests or sub-tenants in violation of clear lease provisions making such occupancy by anyone a lease violation." The building owner brought action for eviction, *Stuyvesant Town Corp. v. Berg*, (126 N. Y. L. J. 1008). The author of the A. B. A. Journal article states:

> "The position of the owner was sustained at all stages of the litigation, including, finally, denial in one of the cases of a stay by one of the justices of the United States Supreme Court."

Upon inquiry to the Clerk of this Court, we are advised that Mr. Justice Jackson on December 5, 1951, signed the order denying a stay, although this action is not officially reported. Apparently the contention of the negroes in question was very similar to that of Petitioner in the instant case, to wit, that by not punishing Respondent, the Iowa Court was assisting in enforcing a restrictive covenant. Petitioner states:

> "Respondent cemetery in this case is attempting to protect itself by using the restrictive covenant as a shield in this damage action. The Iowa Court by its ruling has made it possible for a cemetery to use the covenant as a defense. The Iowa Court has, therefore, by its ruling given vitality to the restrictive covenant and is punishing Petitioner for her failure to abide by it." (Petitioner's Brief, pp. 13, 14.)

Indeed, these persons seeking admission as tenants of the *Stuyvesant Town Corporation* property were in a much stronger position than Petitioner in our case because they were able to say that the Courts of the State of New York were being called upon to *evict* negroes from a prop-

erty to which they were denied access on racial grounds. Nevertheless, they were unsuccessful and Mr. Justice Jackson denied a stay of proceedings pending final determination. Of course, it may be said, and probably was claimed by the property owners that it was seeking to evict the negroes because they had gained possession of the apartment wrongfully, and not solely on the ground that they were negroes. The result was the same, however, and it could as well be said in that case as Petitioner says in the case at bar that the property owner was being allowed by the State Courts to use the racial covenant "as a shield."

Petitioner quotes from and relies largely upon the case of *Gandolfo v. Hart* (Ct. C. Calif. 1892), 49 Fed. 181, in support of her contention that the decision of the Supreme Court of Iowa violated the equal protection clause of the Fourteenth Amendment. As throughout Petitioner's argument, she persistently refuses to recognize the difference between *state action,* which is forbidden by the Amendment, and private action, which by an unbroken line of decisions is not.

The *Gandolfo* case was a bill in equity asking injunction against the owner of real estate to prevent him from leasing it to certain Chinese residents, contrary to the provisions of a restrictive covenant in the title. The defendant challenged the bill by demurrer, which was sustained. The right of the court to enforce a restrictive covenant by injunction was challenged as a violation of the treaty between the United States and China of November 17, 1880, which guaranteed to certain Chinese residents: "all the rights, privileges, immunities and exemptions which are accorded the citizens and subjects of the

most favored nation." The Court held that under the terms of this Treaty and the "equal protection of the laws" provision of the Fourteenth Amendment, the restrictive covenant "should not be enforced in any court—certainly not in a court of equity of the United States."

There is nothing in the *Gandolfo* decision to support in the slightest Petitioner's contention that she has the right to claim a judgment for damages against Respondent on the ground that Respondent refused to permit her to enforce a contract directly contrary to the provisions of such contract, voluntarily entered into.

No one, and certainly not the Respondent, is asking any Court to "enforce" the racial restriction herein involved. Respondent entered into a contract freely and voluntarily with Petitioner, as it had an unquestioned right to do. Petitioner now says:

> "True, you had the right to make this contract, but unless the Court will punish you for doing so, you are being permitted to use the racial restriction as a 'shield'."

Petitioner seeks to support her contention that the Iowa Supreme Court has "violated the equal protection clause of the Fourteenth Amendment" by citing the case of *Clifton v. Punte* (Tex. Civ. App. 1948), 218 S. W. 2d 272 (Petitioner's Brief, p. 15).

Petitioner states (n. 2, p. 15 Brief): "The Texas Civil Appeals Court, in refusing to grant judicial sanction to a restrictive covenant * * * reasoned that as a result of the litigation it was no longer a question of the voluntary choice of the parties to abide by the covenant but had now become the choice of the State of Texas." No

such conclusion can possibly be reached from the decision in that case. Plaintiff-Appellant, CLIFTON, brought an action seeking to enforce forfeiture of title against the defendant by reason of a violation of a racial restriction contained in a deed in the chain of title. The Lower Court entered judgment in favor of defendant and the Court of Civil Appeals affirmed, upon the authority of *Shelley v. Kraemer* and *McGee v. Sipes*, supra. Nothing appears in the case to support Petitioner's contention that the contract ceases to be "voluntary" when one of the parties goes into court. In the *Clifton* case the Court said (at p. 274):

> "Without affirmative enforcement of the racial covenant involved, it would seem that the scheme of restriction applicable to the subdivision of which the property involved here is a part, cannot be effectively realized, should voluntary methods fail."

In other words, all that the Texas Court said in the *Clifton* case, and the only proposition for which that case can be an authority, is that "affirmative enforcement" of a racial covenant by the judicial arm of the State is foreclosed by the holding of the United States Supreme Court in the *Shelley v. Kraemer* and *McGee v. Sipes* cases.

2.

The United Nations Charter Does Not Prevent Racial Discrimination by Private Citizens of States.

Respondent concedes the correctness of the contention of Petitioner that the United Nations Charter is a Treaty and as such is the "Supreme Law of the Land" and that "Judges in every State shall be bound thereby."

The question here, however, is whether anything in this Treaty prohibits private citizens of the States from racial and religious discrimination against each other.

This Court is aware that amici curiae briefs on behalf of the American Association for the United Nations were filed in the *Shelley, McGee* and *Hurd* cases (3 A. L. R. 2d 441; 334 U. S. 28, n. 4).

In the *Sipes v. McGee* case in the Michigan Court (316 Mich. 614; 25 N. W. 2d 638, 644) the same contention regarding the United Nations Treaty was made. The Michigan Court was quoted with approval by the Iowa Supreme Court (R. 39). The United States Supreme Court reviewed the *McGee* case and reversed on constitutional grounds, but offered no criticism on the ruling with reference to the applicability of the Treaty. The California Court gave the Treaty the same interpretation. (*Fujii v. California,* 217 Pac. 2d 481, 218 Pac. 2d 595, Reversed on this point in 242 Pac. 2d 617, 622, 38 Cal. 2d 718.) The decision in the *Fujii* case in the lower California Court had appeared to hold that the Charter of the United Nations had the effect of superseding the California Alien Land Law. It will be recalled that proponents of the Bricker Amendment contended that this Treaty had been held by the lower California Court to have the effect of private law and was binding upon individual citizens in their relations with each other. The California Supreme Court, however (242 Pac. 2d 617, at 622 Calif. 2d 718) said:

> "We are satisfied, however, that the Charter provisions relied upon by plaintiff were not intended to supersede existing domestic legislation * * *."

In the instant case, the Iowa Court correctly held:

> "* * * the provisions of the United Nations Charter have no bearing on the case before the Court." (R. 39.)

The "Treaty" argument is completely disposed of in the Annotations cited, and especially in 3 A. L. R. 2d 484. Petitioner cites no authority contrary to the statement of the Michigan court quoted with approval by the Iowa Court.

> "* * * these pronouncements (Art. 55, 56 United Nations Charter) are merely indicative of a desirable social trend and an objective devoutly to be desired by all well-thinking peoples." (R. 39.)

3.

There is no Federal Public Policy Forbidding Racial Discrimination by Private Citizens of States.

The contention of the Petitioner that the action of the Supreme Court of Iowa violates the public policy of the United States appears to be based solely upon the language of the United States Supreme Court in the *Hurd* case (334 U. S. at 34-35; 92 L. Ed. 1195). It is to be remembered that the decision of this Court in the *Hurd* case rested upon the applicability of the Civil Rights Acts to citizens of the District of Columbia. After so deciding, the opinion states:

> "But even in absence of the statute there are other considerations which would indicate that enforcement of restrictive covenants in these cases is judicial action contrary to the public policy of the United States * * *."

In any event, whether the "public policy" argument was essential to the decision or not, Federal Public Pol-

icy cannot transcend the Constitution. Congress, many years ago, undertook in the Civil Rights Acts to express a public policy respecting rights of individuals within the States, and this Court in the Civil Rights cases held that action to be unconstitutional. If Congress is powerless to forbid private racial discrimination among citizens of the States, and is limited to the District of Columbia, as held in the Civil Rights cases and in the *Hurd* case, where then can any "Federal Public Policy" be found applicable to the facts in the case at bar?

"Public Policy" is not something that can be plucked from the air, and it cannot be declared because it seems right and desirable to the particular judge before whom the question comes. It is well to remember the language of an old English case (*Richardson v. Mellish*, 2 Bing 299):

> "I protest, as my Lord has done, against arguing too strongly on public policy; it is a very unruly horse, and once you get astride it, you will never know where it will carry. It may lead you from sound law. It is never urged at all, but when other points fail."

The Iowa Supreme Court has frequently defined "public policy." In the early case of *Richmond v. Dubuque & Sioux City Ry. Co.* (1868), 26 Ia. 191, the Iowa Court said:

> "But further than this, the power of Courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt."

We submit that the "Public Policy" of the United States applicable to the case at bar is correctly summarized as follows:

1. "Public Policy," as deduced from judicial decisions, is to allow the Citizens the greatest possible measure of liberty consistent with law.
2. Citizens of the States may discriminate between themselves on racial and religious grounds unless forbidden to do so by State statute or decisions.
3. Racial and religious discrimination may not be enforced by "State Action."
4. Citizens of the District of Columbia are forbidden to discriminate by the Civil Rights Acts.
5. In defining "Public Policy" judges determine what the law is; not what they consider it ought to be.

———o———

CONCLUSION

In conclusion, Respondent submits that the only question involved in this review of the opinion of the Iowa Supreme Court is whether there is anything in the Constitution, Laws, or Treaties of the United States which prevents racial discrimination in private contracts. If, as repeatedly stated by this Court, the Fourteenth Amendment "erects no shield against merely private conduct however discriminatory or wrongful" and "* * * restrictive agreements standing alone cannot be regarded as

violative of any rights guaranteed to petitioners * * *," then surely the parties in question had the undoubted right to enter into the contract here involved. It does not follow from the fact that the restrictive covenant cannot be enforced by an injunction in a State Court (*Shelley* and *McGee* cases), nor that a *breach* of the contract cannot be punished by damages (*Barrows*), that one of the parties who freely entered into the contract can recover damages from the other party because such other party refuses to perform a wholly different contract.

If Petitioner is allowed to prevail here, what will be the effect on the right of a private school to maintain racial or religious segregation? If sued by anyone either denied admittance because of such discrimination, or discharged from the institution because of the restriction after admittance had been gained by falsely representing he was of the required race or religious faith, must a State Court award injunction or damages because to allow any defense would constitute "State Action"?

The right to regulate the private conduct of, and to prescribe the rights, duties and obligations between, those within its borders has heretofore been left to each State. Respondent submits this is as it should be. If Petitioner is entitled to recover on the facts stated in her Petition, then this Court will have drastically extended its long established interpretation of the Fourteenth Amendment and will have sanctioned federal invasion of a field heretofore held to be exclusively reserved to the individual States.

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by one of their decisions could appeal to the secular courts and have them reversed."

This decision was recently characterized by this Court as one that "radiates * * * a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff* v. *St. Nicholas Cathedral*, 344 U. S. 94, 116 (1952). The principle established, freedom of church government from state intervention, is so strong that it overrides such policies as majority control within private associations (*Kedroff* and *Watson* cases, *supra*), the prevention of fraud (*Ballard* v. *United States*, 322 U. S. 78 [1944]) and the sanctity of contracts (*McGuire* v. *Trustees of St. Patrick's Cathedral*, 54 Hun 207 [1889]).

The last named case shows an application of these principles to the operation of a cemetery by a church. The plaintiffs there asked the court to compel the defendant church trustees to permit burial of a deceased in the cemetery they operated, in accordance with a contract the deceased had made with them. The trustees refused on the ground that the deceased had not died in communion with the church. The court found that there was an implied condition in the contract that burial in the consecrated ground was limited to those dying in communion. It held, further, that only the church could decide whether the deceased had died in communion. It deemed this conclusion necessary "under a constitutional system which happily separates church and State" (54 Hun at 221).

The principle underlying these cases would operate as a sufficient safeguard against the danger the court below envisaged. Regardless of how the issue arose, under a contract or otherwise, a state court would not interfere with the operation of "church * * * burial places" (R. 37). Operation of a burial ground by a religious institution

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No. 28

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v.

SIOUX CITY MEMORIAL PARK CEMETERY INCORPORATED, a Corporation, F. K. LYTLE and J. M. GUNNELL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA.

BRIEF OF AMERICAN JEWISH CONGRESS AS *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

October Term, 1954

No. 28

EVELYN RICE, Petitioner,

v.

SIOUX CITY MEMORIAL PARK CEMETERY INCORPORATED, a Corporation, F. K. LYTLE and J. M. GUNNELL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA.

BRIEF OF AMERICAN JEWISH CONGRESS AS *AMICUS CURIAE*

Statement of Interest

This brief *amicus curiae* is submitted with the consent of the parties.

The American Jewish Congress is an organization committed to the principle that the destinies of all Americans are indissolubly linked. Accordingly, it seeks to promote the civil and political equality of members of all racial, religious and ethnic groups.

The instant case brings to this Court a question concerning the application of constitutional principles to an instance of discrimination based on race. Mindful of the role of the *amicus curiae*, we have not sought to present

to this Court our own views on that issue; it was fully considered by the court below and has been briefed by the parties here. We file this brief *amicus* because the court below has suggested that the right to freedom from racial discrimination here asserted jeopardizes essential religious freedoms. The special concern with which this organization views protection of religious freedom prompts us to file this brief in which we deal with that point alone.

Statement of the Case

In August 1951, petitioner, Evelyn Rice, learning of the death of her husband, Sergeant John Rice, in action in Korea, entered into a written contract with the respondent, Sioux City Memorial Park Cemetery, Inc., for the burial of his body in its cemetery in Sioux City, Iowa. The contract limited burial to "members of the Caucasian Race." When Sergeant Rice's body arrived, funeral services were held in the cemetery and the body was then left for burial. Thereafter, respondents notified petitioner that they would not bury the body of her husband because they had learned that he was eleven sixteenths of American Indian ancestry. Ultimately, Sergeant Rice's body was buried in Arlington National Cemetery, by order of President Truman.

In December 1951, petitioner brought this action in an Iowa State District Court, claiming damages. Respondents, in defense, relied on the Caucasians only clause of the contract. Petitioner asserted, *inter alia*, that allowance of this defense by the courts would deprive her of equal protection of the laws as guaranteed by the Fourteenth Amendment. The trial court granted respondents' motion to dismiss and this action was affirmed, on appeal, by the Iowa Supreme Court. The case is here on writ of certiorari to that court.

The Question to Which This Brief is Addressed

Shelley v. *Kraemer*, 334 U. S. 1 (1948) and *Barrows* v. *Jackson*, 346 U. S. 249 (1953) establish that the Fourteenth Amendment bars state courts from granting enforcement, either by injunction or award of damages, to contractual clauses requiring discrimination on the basis of race or color. In the present case, petitioner contends, and respondents deny, that the rule of the *Shelley* case bars not only enforcement of discriminatory contracts but also reliance on discriminatory clauses as a defense to an action on a contract. In deciding this issue adversely to petitioner, the court below said that petitioner's argument, if upheld, would "abridge desirable individual rights of restriction in church and fraternal private burial places" (R. 37).

Thus it appears that the court below assumed that a decision holding that respondent cemetery could not effectively contract to discriminate on the basis of race would necessarily apply to a cemetery that sought to limit burial rights on the basis of religion. We address ourselves here solely to the question whether that assumption was valid. For reasons stated below, we believe that the two situations are not governed by identical constitutional considerations.

It is important to note that the consideration suggested by the court below would have had just as much validity in the original *Shelley* case. The difficulty is not created by the fact that a discriminatory contract clause is now relied on as a defense to, rather than as the basis of, an action on a contract, the only factor that distinguishes the case at bar from *Shelley*.

Thus, suppose a religious organization maintaining a cemetery in land that it had sanctified, sold a portion of it to a fraternal society under a contract limiting burial to

the bodies of persons who died in its own faith. Thereafter, the society sought to admit persons of other faiths to burial rights. If the religious organization brought suit to enjoin violation of its contract, the court would have to deny it relief unless the *Shelley* case were viewed as permitting the accommodation between constitutional rights that we suggest below.

We submit that the *Shelley* case need not be so construed. As we now show, the difficulty suggested by the court below is avoided when appropriate weight is given to the guarantee of religious freedom contained in the First Amendment, as made applicable to the states by the Fourteenth.

ARGUMENT

POINT ONE

When a cemetery association limits burial rights to persons of a particular religious faith, the right to equal protection of the laws may have to be accommodated to the right to religious freedom.

The primary purpose of the Fourteenth Amendment was to prohibit state action that discriminates on the basis of race or color. *Slaughter-House Cases*, 83 U. S. (16 Wall.) 36, 81 (1873); *Strauder* v. *West Virginia*, 100 U. S. 303, 306 (1880); *Shelley* v. *Kraemer*, 334 U. S. 1 (1948). Accordingly, it has been established that "discriminations based on race alone are obviously irrelevant and invidious." *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, 203 (1944); "* * * only the most exceptional circumstances can excuse discrimination on that basis in the face of the

equal protection clause * * * " *Oyama* v. *California*, 332 U. S. 633, 646 (1948).[1]

The question whether the Fourteenth Amendment prohibits state action that discriminates on the basis of religion has not, to our knowledge, been raised. This Court has twice stated, in dicta, that governments may not make such distinctions. *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100 (1947); *Wieman* v. *Updegraff*, 344 U. S. 183, 191-192 (1952). Further, some of the cases arising under the guarantee of religious freedom may also be taken as condemning official religious distinctions. See, for example, *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953).

Yet it cannot be said that government is altogether barred from recognizing that some of its citizens have special needs because of their religious beliefs. In a number of situations, government does give religious groups special consideration necessary to prevent interference with their beliefs.

For example, persons whose religious convictions proscribe their bearing arms may constitutionally be exempted from military service while those who have no conscientious objections or who object on political or philosophical grounds are not. *Selective Draft Law Cases*, 245 U. S. 366 (1918); *United States* v. *Kauten*, 133 F. 2nd 703 (C. C. A. 2, 1943). The compulsory Sunday laws of many states expressly exempt from their operation, either in whole or in part, persons whose religious convictions compel them to observe a day other than Sunday as their sacred day of rest. New York Penal Law (McKinney's

[1] During the wartime evacuation of citizens of Japanese descent from the West Coast, this Court upheld Federal regulation based solely on race, upon finding that there was a danger of sabotage and espionage that might assist an enemy invasion. *Hirabayashi* v. *United States*, 320 U. S. 81 (1943); *Korematsu* v. *United States*, 323 U. S. 214 (1944). Even if these cases would be decided the same way today, which we doubt, they sanction racial distinctions only in case of "pressing public necessity." *Korematsu* case, 323 U. S. at 216.

Consolidated Laws, Book 39) Section 2144; *Johns* v. *State*, 78 Ind. 832 (1881); Pfeffer, *Church, State and Freedom*, pp. 235-236. In most states, a Sabbatarian may not be denied unemployment insurance benefits for refusing to accept employment requiring him to work on Saturday, although a non-Sabbatarian refusing such employment forfeits his right to benefits. *Tary* v. *Board of Review*, Supreme Court of Ohio, decided March 31, 1954; *Swenson* v. *Michigan Employment Security Commission*, Supreme Court of Michigan, decided September 20, 1954; Pfeffer, *Church, State and Freedom*, p. 598. For more than a century, by statute and judicial decision, witnesses have enjoyed a privilege as to confessions made to clergymen in the course of discipline enjoined by the rules or practice of the faith to which they belong, whereas no privilege is accorded to confessions made outside the discipline of a religious faith. 5 Wigmore, Evidence, 2nd ed., Section 2395. These illustrations are sufficient to show that no constitutional provision prohibits governmental distinctions necessarily made to protect the free exercise of religion.

As to a cemetery operated by a religious group, the state might well find it necessary to give effect to religious restrictions because to do otherwise would interfere with freedom of conscience. Orthodox Jews[2] and Catholics[3], to name but two faiths, regard burial as a religious rite and maintain plots of sanctified ground in which the burial of persons of other faiths is not permitted. State action that compelled such groups to violate their religious principles would offend against constitutional inhibitions. *West Virginia* v. *Barnette*, 319 U. S. 624 (1943); *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925).

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[2] *Talmud, Tractate Gittin*, 61a, *Rashi's Commentary*; Greenwald, *Kol Bo al Aveloth*, Encyclopedia on Rules of Mourning (1947), p. 194.

[3] Bouscaren & Ellis, *Canon Law, Text and Commentary* (1951), p. 685.

A court might, of course, be asked to choose between conflicting claims of constitutional privileges under the equal protection and freedom of conscience guarantees. That would occur, for example, in the church cemetery situation suggested by the court below as well as in the situation suggested by us above in which the cemetery association is the plaintiff rather than the defendant. Such a case, however, would merely require application of the familiar principles that control the process of "weighing the two conflicting interests." *Cantwell* v. *Connecticut*, 310 U. S. 296, 307 (1940); *Thornhill* v. *Alabama*, 310 U. S. 88, 105 (1940); *Martin* v. *Struthers*, 319 U. S. 141, 143 (1943).

In resolving such a conflict, the courts will consider not only the relative importance of the conflicting objectives but also the extent of the threatened impairment of each. "In every case the power to regulate must be so exercised as not, in attaining a permissible end, *unduly* to infringe a protected freedom." *Cantwell* case, *supra*, 310 U. S. at 304 (emphasis supplied) "And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights." *Schneider* v. *New Jersey*, 308 U. S. 147, 161 (1939).

POINT TWO

The constitutional requirement of separation of church and state, in requiring that the state refrain from interference with the internal affairs of religious organizations, would prevent any court action compelling a religious organization to violate its tenets in the operation of a cemetery.

The considerations outlined above would apply to any party operating a cemetery according to religious principles that placed restrictions on who could be buried. Even more weighty considerations apply in favor of the right of restriction when a cemetery is operated by a church or other religious body.

The separation requirement of the First Amendment strictly limits government interference with the internal affairs of religious associations. In *Watson v. Jones*, 80 U. S. 679, 728-729 (1871), this Court said:

> "In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. * * * The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved

is one of those "matters of church government" which the *Kedroff* decision describes as entitled to freedom from state interference. We believe that any court would hold, with the New York court in the *McGuire* case: "To attempt to exercise jurisdiction in such matters * * * would be the entering wedge whereby the symmetry of our governmental system with regard to church and State might readily be destroyed" (54 Hun at 221).

Conclusion

Petitioner's argument that the decision below should be reversed because it denied her equal protection of the laws as guaranteed by the Fourteenth Amendment may be sustained without abridging exercise of the constitutionally protected freedom of religion.

Respectfully submitted,

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October, 1954

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Supreme Court of the United States

October Term, 1954

No. 28

EVELYN RICE,
Petitioner,

vs.

SIOUX CITY MEMORIAL PARK CEMETERY, INCORPORATED, A Corporation; F. K. LYTLE, and J. M. GUNNELL
Respondents.

PETITION FOR REHEARING

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—o—

PETITION FOR REHEARING

—o—

MAY IT PLEASE THE COURT:

On February 15, 1954, petitioner sought certiorari in this Court, and on April 12, 1954, certiorari was granted (R. 50). The case was orally argued on its merits to eight members of this Court on the 8th day of November, 1954. On November 15, 1954, the judgment of the Supreme Court of Iowa was affirmed by an equally divided Court without an opinion.

The issues involved are whether the Supreme Court of Iowa by its ruling has committed such state action as is in violation of:

(1) Due process of law under the Fourteenth Amendment.

(2) The equal protection clause of the Fourteenth Amendment.

(3) The United Nations Charter, and

(4) The public policy of the United States.

A final determination of this case must directly involve each of these four issues, and the Supreme Court of Iowa in defeating petitioner directly ruled on these propositions.

Each of the four propositions involve basic and fundamental human rights as they are applied to the facts of this case. The result of the affirmance by an evenly divided Court without opinion is that the final word on these fundamental and important federal questions has been rendered by the Iowa Supreme Court, contrary not only to the belief of this petitioner but also to the belief of four members of this Court. That the problems presented are of great national importance is evidenced not only by the facts of this case but also by the fact that certiorari was granted by this Court. These questions of great public importance now remain unresolved by this Court. The question of the applicability of the Charter is so acute that some believe a constitutional amendment is needed to limit the treaty power.

Without a written opinion to which this petition for rehearing might be addressed, it is impossible for petitioner to know which points should be stressed.

From the questions asked at the time of the oral summation, it is apparent that at least some of the Court had difficulty with what was an apparent attempt to reform or redraw a contract. Others indicated an interest, if not a problem, in the effect which petitioner's success might have on religious cemeteries. There was likewise

an indication of a possible doubt as to whether the Iowa Court's ruling amounted to state action at all.

To the questions of rewriting the contract and state action, we respectfully urge a reconsideration of *Hurd v. Hodge, Shelley v. Kraemer,* and *Barrows v. Jackson,* referred to in our Brief on the Merits. We are no more seeking a rewriting of the contract here than were the parties in those cases who were directly or indirectly interested in seeing that no life or force be given to the racial restrictive covenant involved. It isn't so much a question of rewriting the contract as it is of refusing to give judicial sanction to a legally offensive racial restrictive covenant.

As to the question of the effect on religious cemeteries, if that caused any of the Justices to vote for affirmance, we will ask again that they reconsider the meaning and function of the First Amendment to the United States Constitution and the cases which indicate that, where there is a possible clash between the First and Fourteenth Amendments, the Court must weigh the conflicting interests, and, in the case of religious cemeteries, the guarantee of religious freedom could and should override the guarantee of equal protection. See *Watson v. Jones,* 80 U. S. 679 (1871); *McGuire v. Trustees of St. Patrick's Cathedral,* 54 Hun 207 (1889); *Kedroff v. St. Nicholas Cathedral,* 344 U. S. 94 (1952).

At the time of the oral arguments, the Court had only eight members because of the untimely death of Mr. Justice Jackson, and the President has now nominated a successor who is yet to be confirmed by the Senate. Because of the great and obvious importance to this peti-

tioner, because the issues involve fundamental human rights under our Constitution, treaties, and public policy, and because of the great public importance of this discussion and decision on racial restrictive covenants in public cemeteries, we appeal to the sound discretion of this Court and ask that a rehearing be ordered after the new Justice has been confirmed and has taken his place on the Court. A decision can then be made either for or against this petitioner in a written opinion which will serve as a guide or as an answer to future situations involving the racial restrictive covenants in public cemeteries and involving the question of whether a racial restrictive covenant may be used as a defense in a damage action.

Respectfully submitted,

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Sioux City 1, Iowa,

Counsel for Petitioner.

KINDIG & BEEBE,

Of Counsel.

CERTIFICATE OF COUNSEL

We, Lowell C. Kindig and Neil R. McCluhan, counsel for petitioner, hereby certify that this Petition for Rehearing is presented in good faith and not for delay, and further certify that the time involved in a rehearing will in no way adversely affect either the petitioner or the respondent.

NEIL R. MCCLUHAN,
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LOWELL C. KINDIG,
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Counsel for Petitioner.

PROOF OF SERVICE

I, Lowell C. Kindig, one of the attorneys for petitioner, hereby certify that on the ..... day of December, 1954, I served a copy of the within Petition for Rehearing upon Jesse E. Marshall and H. C. Harper, attorneys for respondent, in their respective offices, by personally delivering a copy to them.

LOWELL C. KINDIG,
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Sioux City 1, Iowa.